United States Court of Appeals

for the Second Circuit

APPENDIX

75-7425

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO, d/b/a COMO BROS., and THOMOS DEMARCO,

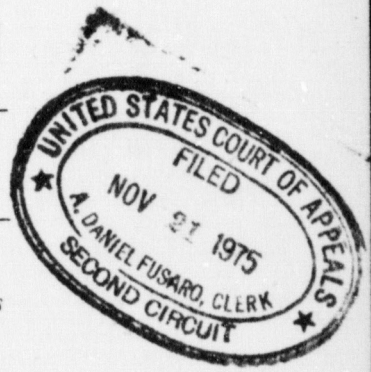
Plaintiffs-Appellants,

vs.

STANDARD FRUIT & STEAMSHIP CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York



APPENDIX

Volume I, pp. 1a – 300a

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DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

72 CIV. 1263

TITLE OF CASE

[illegible] d/b/a [illegible]

[illegible]

AGAINST,

[illegible] COMPANY.

ATTORNEYS

[illegible]
186 Jerolemon Street,
Brooklyn, N.Y. 11201

7/23

For defendant:
Milbank, Twee, Hadley & McCloy
One Chase Manhattan Plaza, NY 10005

7/25-74 C

UNITED STATES COURT OF APPEALS
FILED
AUG 18 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

STATISTICAL RECORD

COSTS

DATE

Docket fee

Witness fees

Depositions

A

Docket Entries

U.S. PLYWOOD ... STANDARD FRUIT AND STEAMSHIP COMPANY.

(PAGE 2)

DATE	PROCEEDINGS
3-27-72	FILED COMPLAINT. ISSUED SUMMONS.
APR 11-72	Filed summons with marshal's return. Served Standard Fruit and Steamship Co. by Claude C. Allen on 3/29/72.
Apr 20.72	Filed Stip & Order extending time to answer to complaint to 5/8/72 So Ordered McLean J.
May 8,72	Filed Stipulation & Order extending time for dfts. to answer to complaint to 5/30/72. So Ordered Lasker J.
May 18-72	Filed Notice of Motion re: Dismiss Complaint. Ret. 5/30/72
May 18-72	Filed Memorandum in support of motion to dismiss for lack of subject matter
Jul 13 72	Filed ... Decision ... MOTLEY J. --The defts' motion to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of FRCP, is granted. Complaint dismissed with leave to the plaintiff to file an amended complaint within 20 days. /s/
Jul 14 72	Filed Judgment-Ordered ... (mailed notice) 7/17/72
Jul 19-72	Filed Amended Complaint.
Aug.2-72	Filed stipulation & order extending deft's time to answer amended complaint to 8/14/72. So ordered. Frankel, J.
Aug.3-72	Filed ANSWER to amended complaint.
Sep.5-72	Filed pltffs' affdvt. and notice of motion . Re; Production and Inspection. Ret. 9-19-72.
Sep.5-72	Filed pltffs' Memorandum in support of motion.
Sep 15-72	Filed defts Memo in opposition to pltffs motion for production of documents.
Sep.27-72	Filed Defts affdvt & notice of motion for an order pursuant to Rule 20(a) & 21 of F.R.C.P. severing the separate & distinct causes of action set forth in the amended complaint. ret: 10-16-72
Sep.27-72	Filed memorandum of law in support of motion for severence.
Oct.16-72	Filed ... Decision on motion filed 9-27-72. ... Mr. Sparlato, attorney ... by signed note dated 10-16-72 So ordered. (mailed notice) MOTLEY, J.
Oct.1--72	Filed pltffs request to produce.
Nov.16-72	Filed Memo Endorsed on motion filed 9-27-72. There being a right to relief severally in respect of the same series of transactions by defts, namely ... Decision ... for severance is DENIED. However the court will direct that ... trials be held if necessary, to prevent prejudice to the defts. So Ordered 11-16-72. So ordered (no filed notice) MOTLEY, J.
[illegible]	[illegible]
Apr.-7-	... to produce documents.
May7-73	Filed MEMO-END. on motion dtd 4-20-73. The within motion is referred Magistrate Schreiber for settlement. Magistrate Schreiber shall conduct pre-trial proceedings to culminate in a joint pretrial order. MOTLEY, J. (mn)
Jun.28-73	Filed affidavit of W.Lacoume Re; Cargo Sheets(IBM runs)
Sep 24-73	Filed defts interrogatories to pltff Thomas J. Cargo.
Sep 24-73	Filed defts interrogatories to pltff Lombino & Sons, Inc.
Sep 24-73	Filed defts interrogatories to pltff Anthony Como and Orozio Como d/b/a Como Bros.
Sep 25-7-	Filed pltffs interrogatories to deft.
Nov. 19-73	Filed deft's answers to interrogs.
Nov. 27-73	Filed pltff. Lombino & Sons' answers to interrogs.
Nov. 2-73	Filed stip & order that the date on which pltffs. and deft. must answer interrogs is extended to 11-16-73. So ordered- MOTLEY, J.
Jan.22-74	Filed pltff's interrogs. (Second Set)
Dec.-7-	Pre trial conference held. ... MOTLEY, U.S. ...

Docket Entries

LOMBINO & SONS, INC. ET AL-vs-STANDARD FRUIT & STEAMSHIP CO. -- 72 CIV. 1263

DOCKET (PAGE # 3) JUDGE MOTLEY

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED EMOLUMENT RETURN
Jan. 28-74	Filed supplemental answers to deft's interrogs. to pltff. Como			
Jan. 28-74	Filed supplemental answers to deft's interrogs. to pltff. De-farco			
Jan. 28-74	Filed supplemental answers to deft's interrogs. to pltff. Lombino			
Feb 4-74	Filed deft's answers to interrogs (second set)			
Feb 4-74	Filed deft's supplemental answers to interrogs.			
Feb. 20-74	Filed deft's amended second supplemental answer to interrogs.			
March 22-74	Filed deft's preliminary pre-trial memorandum.			
March 28-74	Filed deft's request for admission of facts.			
Apr. 10-74	Filed deft's request to produce			
Feb. 5-74	Pre-trial conference held- Schreiber, U.S. Mag.			
Mar. 26-74	Pre-trial conference held- Schreiber, U.S. Mag.			
Feb 26-74	PRE-TRIAL CONFERENCE HELD BY Schreiber U.S.Mag.			
Apr. 26-74	Pre-trial conference held- Schreiber, U.S. Mag.			
May 8-74	PRE-TRIAL CONFERENCE HELD BY - Schreiber, U.S.Mag.			
June 25-74	Pre-trial conference held- Schreiber, U.S. Mag.			
July 16-74	Filed stipulation between both parties that deft's request for admission of facts is amended as indicated.			
July 22-74	Filed deft's amended preliminary pre-trial memorandum.			
July 22-74	Filed deft's answers to interrogs (third set)			
Jul. 31-74	Pre-trial conference held- Schreiber, U.S. Mag.			
Jul 25-74	Pre-trial conference held- Schreiber, U.S. Mag.			
Aug. 15-74	Pre-trial conference held- Schreiber, U.S. Mag.			
Sep 19-74	Filed Pre Trial Order Motley, J.			
Sep19-74	Filed pltffs amended pre-trial memo.			
Sep19-74	Filed pltffs pre trial memo.			
Sep19-74	Filed defts pre trial memorandum/			
Sep19-74	Filed pltffs interrogatories to deft. (third set).			
Sept 9-74	PRE-TRIAL CONFERENCE HELD BY Schreiber U.S.Mag.			
Mar. 20-75	Filed Order- in accordance with the " Plan for Disposition of Three Year Old Civil Cases, this case is to be ready for trial on 6-2-75 as indicated. So ordered- MOTLEY, J. (m/n)			
July 9-75	Before MOTLEY, J. non-Jury trial begun.			
July 10-75	trial cont'd and concluded. Judge's decision in favor of deft. as indicated in court's minutes.			
July 11-75	Filed pltffs' trial memorandum			
July 11-75	Filed transcript of record of proceedings, dated 7-9-75			
July 14-75	Filed Judgment- ordered that deft. have judgment against the pltffs. dismissing t complaint. Clerk (m/n)			

FILINGS—PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	AMOUNT REPORTED / EMOLUMENT RETURNS
July 22-75 Filed pltffs' notice of appeal from the final judgment ~~entered on~~ 7-11-75. Copy to: Milbank, Tweed, Hadley & McCloy. Ent. 7-23-75			

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____ Deputy Clerk

AMENDED COMPLAINT (Filed July 19, 1972) 5a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO d/b/a/ COMO BROS., and THOMAS DeMARCO,

Plaintiffs,

- against -

STANDARD FRUIT AND STEAMSHIP CO.

Defendant

AMENDED COMPLAINT

72C1263

AS AND FOR A FIRST CAUSE OF ACTION PLAINTIFF, LOMBINO & SONS, INC., BY RICHARD J. SCARLATO, ITS ATTORNEY COMPLAINS OF THE DEFENDANT AND ALLEGES:

1. This action arises under the provisions of the Robinson Patman Act, 49 stat. 1528 (14 U.S.C. Section 13a), and The Clayton Act, 38 Stat. 731 (15 US.C. Section 15).

2. That at all times hereinafter mentioned, plaintiff, LOMBINO & SONS, INC. was and now is a domestic corporation with its principal place of business in the County of New York, City and State of New York.

3. Upon information and belief, that at all the times hereinafter mentioned defendant was and now is a foreign corporation maintaining its principal office in the State of Louisiana and an office at Pier 42 East River, New York, New York.

4. Upon information and belief, defendant is duly licensed to conduct business in the State of New York with an office for the regular transaction of business in the County of New York, City and State of New York, Pier 42, East River.

5. At all times hereinafter mentioned, the defendant has been and now is engaged in the sale and distribution, in interstate commerce, of bananas. 6a

6. At all times hereinafter mentioned, the plaintiff, LOMBINO & SONS, INC., was and still is the proprietor of a wholesale banana establishment located at 211 Duane Street, County, City and State of New York, and has sold and offered for sale to the retail trade the bananas sold and distributed by the defendant to this plaintiff.

7. That throughout the period of March 1, 1968, to the present time the defendant has sold and distributed bananas to the plaintiff, LOMBINO & SONS, INC., said sales being in interstate commerce.

8. That during the period March 1, 1968 to the present time, the defendant sold and distributed, in commerce, bananas of equal grade and quality to competition of the plaintiff, LOMBINO & SONS, INC., said competitors being located in the State of New York who, in turn sold the said bananas to the retail trade. In the furtherance of such sales and distribution of its bananas, the defendant contracted to furnish and did furnish to many of the foregoing purchasers and/or competitors, but not to this plaintiff, discounts and other reductions in price.

9. The defendant discriminated, in interstate commerce, against this plaintiff in furnishing to a number of plaintiffs competitors located in the State of New York sales at prices not accorded to this plaintiff.

10. As a result of such discrimination, plaintiff has been damaged in the sum of TWO HUNDRED THOUSAND 00/100 ($200,000.00) DOLLARS.

11. Under the provisions of Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15, plaintiff is entitled to recover of the defendant three-fold damages by it sustained, together with costs of this suit and a reasonable attorney's fee.

Amended Complaint

AS AND FOR A SECOND CAUSE OF ACTION PLAINTIFFS, ANTHONY COMO and ORAZIO COMO d/b/a COMO BROS., BY THEIR ATTORNEY, RICHARD J. SGARLATO, COMPLAIN OF THE DEFENDANT AND ALLEGES:

12. This action arises under the provisions of The Robinson Patman Act, 49 Stat. 1528 (15 U.S.C. Section 13a), and the Clayton Act, 28 Stat. 731 (15 U.S.C. Section 15).

13. That at all times hereinafter mentioned, plaintiff ANTHONY COMO was and now is a citizen and resident of the County of Richmond, City and State of New York and plaintiff ORAZIO COMO was and now is a resident of the County of Kings, City and State of New York.

14. Upon information and belief, that at all the times hereinafter mentioned defendant was and now is a foreign corporation maintaining its principal office in the State of Louisiana and an office at Pier 42 East River, New York, New York.

15. Upon information and belief defendant is duly licensed to conduct business in the State of New York with an office for the regular transaction of business in the County of New York, City and State of New York, Pier 42, East River.

16. At all times hereinafter mentioned, the defendant has been and now is engaged in the sale and distribution, in interstate commerce, of bananas.

17. At all times hereinafter mentioned, the plaintiffs, ANTHONY COMO and ORAZIO COMO did business as COMO BROS. and were the owners of a wholesale banana establishment located at 80 Union Street, County of Kings, City and State of New York, and have sold and offered for sale to the retail trade the bananas sold and distributed by the defendant to these plaintiffs.

18. That throughout the period of March 1, 1968 to December 31, 1969, inclusive, the defendant has sold and distributed

plaintiffs, COMO BROS., said sales being in interstate commerce.

19. That during the period March 1, 1968 through December 31, 1969, the defendant sold and distributed, in commerce, bananas of equal grade and quality to competition of the plaintiffs, COMO BROS., said competitors being located in the State of New York who, in turn sold the said bananas to the retail trade. In furtherance of such sale and distribution of its bananas, the defendant contracted to furnish and did furnish to many of the foregoing purchasers and/or competitors, but not to this plaintiff, discounts and other reductions in price.

20. The defendant discriminated, in commerce, against these plaintiffs, COMO BROS., in furnishing to a number of their competitors located in the State of New York sales at prices not accorded to these plaintiffs.

21. As a result of such discrimination, these plaintiffs have been damaged in the sum of THIRTY-FIVE THOUSAND 00/100 ($35,000.00) DOLLARS.

22. Under the provisions of Section 4 of The Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15, plaintiffs are entitled to recover of the defendant three-fold damages by it sustained, together with costs of this suit and a reasonable attorney's fee.

AS AND FOR A THIRD CAUSE OF ACTION, PLAINTIFF THOMAS DEMARCO, BY RICHARD J. SGARLATO, HIS ATTORNEY, COMPLAINS OF THE DEFENDANT AND ALLEGES:

23. This action arises under the provisions of the Robinson Patman Act, 49 Stat. 1528 (15 U.S.C. Section 13a), and The Clayton Act, 38 Stat. 731 (15 U.S.C. Section 15).

24. That at all times hereinafter mentioned, plaintiff, THOMAS DEMARCO was a resident of the County of New York, City and State of New York and is now a resident of the County of Westchester, State of New York.

25. Upon information and belief, that at all the times hereinafter mentioned defendant was and now is a foreign corporation maintaining its principal office in the State of Louisiana and an office at Pier 42 East River, New York, New York.

26. Upon information and belief, defendant is duly licensed to conduct business in the State of New York with an office for the regular transaction of business in the County, City and State of New York, Pier 42, East River.

27. At all times hereinafter mentioned, the defendant has been and now is engaged in the sale and distribution, in interestate commerce, of bananas.

28. At all times hereinafter mentioned, the plaintiff THOMAS DEMARCO has been the owner of a wholesale banana establishment located at 167 Mulberry Street, County, City and State of New York, and has sold and offered for sale to the retail trade the bananas sold and distributed by the defendant to this plaintiff.

29. That through the period March 1, 1968 to July 31, 1969, the defendant has sold and distributed bananas to the plaintiff, THOMAS DEMARCO, said sales being in interstate commerce.

30. That during the period March 1, 1968 to July 31, 1969, the defendant sold and distributed, in commerce, bananas of equal grade and quality to competition of the plaintiff located in the State of New York who, in turn sold the said products to the retail trade. In the furtherance of such sale and distribution of its bananas, the defendant contracted to furnish and did furnish to some of the foregoing purchasers and/or competitors, but not to this plaintiff, discounts and other reductions in price.

31. The defendant discriminated, in commerce, against this plaintiff THOMAS DEMARCO in furnishing to a number of plaintiff's competitors located in the State of New York sales at prices not accorded to this plaintiff.

32. As a result of such discrimination, plaintiff THOMAS DEMARCO has been damaged in the sum of TEN THOUSAND 00/100 ($10,000.00) DOLLARS.

33. Under the provisions of Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15, plaintiff is entitled to recover of the defendant three-fold damages by it sustained, together with costs of this suit and a reasonable attorney's fee.

WHEREFORE, plaintiff LOMBINO & SONS, INC., demands judgment against defendant in the first cause of action in the sum of SIX HUNDRED THOUSAND 00/100 ($600,000.00) DOLLARS, and FIFTY THOUSAND 00/00 ($50,000.00) DOLLARS, a reasonable attorney's fee; plaintiffs ANTHONY COMO and ORAZIO COMO d/b/a/ COMO BROS. demand judgment against defendant in the second cause of action in the sum of ONE HUNDRED FIVE THOUSAND 00/100 ($105,000.00) DOLLARS and TWENTY THOUSAND 00/100 ($20,000.00) DOLLARS, a reasonable attorney's fee; plaintiff THOMAS DEMARCO demands judgment against defendant in the third cause of action in the sum of THIRTY THOUSAND 00/100 ($30,000.00) DOLLARS and TEN THOUSAND 00/100 ($10,000.00) DOLLARS, a reasonable attorney's fee; all together with the costs and disbursements of these three (3) actions.

DATED: July 18, 1972
Brooklyn, New York

Richard J. Scarlato

RICHARD J. SCARLATO
Attorney for Plaintiffs
Office and P.O. Address
186 Joralemon Street
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO d/b/a COMO BROS., and THOMAS DeMARCO, :

Plaintiffs, : ANSWER

-against- : 72 Civ. 1263

STANDARD FRUIT AND STEAMSHIP CO., :

Defendant. :

- -x

Defendant, by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the amended complaint:

1. Denies each and every allegation contained in paragraph 1, except admits that the action purportedly arises under the statutory provisions referred to.

2. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2.

3. Admits the allegations contained in paragraph 3, except denies that it now maintains its principal office in the State of Louisiana.

4. Denies each and every allegation contained in paragraph 4, except admits that it maintains an office at Pier 42, East River, New York City.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 6.

6. Denies each and every allegation contained in paragraph 7, except admits that from time to time during the

period March 1, 1968 to July 20, 1972 plaintiff Lombino & Sons, Inc. purchased bananas from defendant.

7. Denies each and every allegation contained in paragraphs 8, 9, 10 and 11.

8. Denies each and every allegation contained in paragraph 12, except admits that the action purportedly arises under the statutory provisions referred to.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 13.

10. Admits the allegations contained in paragraph 14, except denies that it now maintains its principal office in the State of Louisiana.

11. Denies each and every allegation contained in paragraph 15, except admits that it maintains an office at Pier 42, East River, New York City.

12. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 17.

13. Denies each and every allegation contained in paragraph 18, except admits that from time to time during the period March 1, 1968 to December 31, 1969 plaintiff Como Bros. purchased bananas from defendant.

14. Denies each and every allegation contained in paragraphs 19, 20, 21 and 22.

15. Denies each and every allegation contained in paragraph 23, except admits that the action purportedly arises under the statutory provisions referred to.

16. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation

contained in paragraph 24.

17. Admits the allegation contained in paragraph 25, except denies that it now maintains its principal office in the State of Louisiana.

18. Denies each and every allegation contained in paragraph 26, except admits that it maintains an office at Pier 42, East River, New York City.

19. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 28.

20. Denies each and every allegation contained in paragraph 29, except admits that from time to time during the period March 1, 1968 to July 31, 1969 plaintiff Thomas DeMarco purchased bananas from defendant.

21. Denies each and every allegation contained in paragraphs 30, 31, 32 and 33.

FOR A PARTIAL DEFENSE TO ALL CAUSES OF ACTION, DEFENDANT ALLEGES:

22. All claims alleged which arose more than four years prior to the filing of the complaint are barred by the Statute of Limitations (15 U.S.C. § 15b).

WHEREFORE, defendant demands judgment dismissing the amended complaint with costs and disbursements.

Dated: New York, N.Y.
August 1, 1972

MILBANK, TWEED, HADLEY & McCLOY

By William E. Jackson
A Member of the Firm
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO d/b/a COMO BROTHERS and THOMAS DEMARCO,

Plaintiffs,

-against-

STANDARD FRUIT AND STEAMSHIP COMPANY,

Defendant.

----------X

PRE - TRIAL ORDER

72C1263 CBM

I. JURISDICTIONAL STATEMENT

This action arises under the provisions of the Robinson Patman Act, 49 Stat. 1528 (15 U.S.C. Section 13a), and the Clayton Act, 38 Stat. 731 (15 U.S.C. Section 15).

II. AMENDMENTS TO PLEADINGS

a. Plaintiff, COMO BROS., seeks to amend paragraph 21 of the complaint herein to read as follows:

> As a result of such discrimination, these plaintiffs have been damaged in the sum of $40,000.00.

b. Plaintiff, COMO BROS., seeks to amend the last paragraph of the complaint herein to read as follows:

> WHEREFORE, plaintiff LOMBINO & SONS, INC., demands judgment against defendant in the first cause of action in the sum of $600,000.00 and $50,000.00 as reasonable attorneys fee; plaintiffs ANTHONY COMO and ORAZIO COMO d/b/a COMO

BROS., demand judgment against defendant in the second cause of action in the sum of $120,000.00 and $20,000.00 as reasonable attorneys fee; plaintiff THOMAS DeMARCO demands judgment against defendant in the third cause of action in the sum of $30,000.00 and $10,000.00 as reasonable attorneys fee; all together with the costs and disbursements of these three actions.

c. Plaintiff COMO BROS., seek to amend paragraph 18 of the complaint to read as follows:

> That throughout the period of March 1, 1968 to June 30, 1970 inclusive, the defendant has sold and distributed bananas to the plaintiffs, COMO BROS.

d. Plaintiff, COMO BROS., seek to amend paragraph 19 of the complaint as follows:

> That during the period March 1, 1968 through June 30, 1970 the defendant sold and distributed bananas of equal grade and quality to competition of the plaintiffs, COMO BROS., said competitors being located in the State of New York, who in turn, sold the said bananas to the retail trade. In furtherance of such sale and distribution of its bananas the defendant contracted to furnish and did furnish to many of the foregoing purchasers and/or competitors but not to this plaintiff discounts and other reductions in price.

e. Plaintiffs seek to amend answer to defendant's interrogatories as follows:

> Wherever plaintiffs' answers to defendant's interrogatories refer to Exhibit A, plaintiffs request substitution of plaintiffs proposed Exhibit 1.

f. The basis for amendments A through E are allegedly due to the discovery by plaintiffs of certain records of defendant which were not reviewed by plaintiffs at the time defendant's records were produced.

g. Defendant has no objection to amendments.

III. UNDISPUTED FACTS

a. Plaintiff LOMBINO & SONS, INC. maintained a place of business in the City, County and State of New York at all times mentioned in the amended complaint.

b. Plaintiff ANTHONY COMO was at all times mentioned in the amended complaint a citizen and resident of the County of Richmond, City and State of New York.

c. Plaintiff ORAZIO COMO was at all times mentioned in the amended complaint a citizen and resident of the County of Kings, City and State of New York.

d. Plaintiff THOMAS DE MARCO was at all times mentioned in the amended complaint a citizen and resident of the County, City and State of New York.

e. Defendant is a corporation organized under the laws of the State of Delaware and transacts business at, among other places, Pier 42, East River, New York, New York.

f. Defendant is engaged in importing and distributing bananas in interstate commerce.

g. During the period March 29, 1968 through March 28, 1972, inclusive, the plaintiffs purchased bananas from the defendant as indicated by Defendant's Request for Admission of Facts, dated March 27, 1974 as amended by stipulation dated July 8, 1974 and admitted by Plaintiffs (hereinafter the "Request").

h. Defendant sold bananas to various New York City wholesalers, including plaintiffs, at various prices during the period March 29, 1968 to March 28, 1972.

i. Plaintiffs' Proposed Exhibit 1 as amended is an accurate summary of certain sales to plaintiffs by defendant.

j. Any claims which arose prior to March 28, 1968 are barred by the applicable statute of limitations.

IV. FACTUAL POSITION ON LIABILITY AND DAMAGES

a. Plaintiffs' position is as follows:

This action arises under the provision of th Robinson Patman Act and alleges, in substance, that the defendant has practiced price discrimination in selling its bananas to the plaintiffs', wholesales, distributors in the City of New York.

In the course of this proceeding, plaintiffs' have examined various records maintained by the defendant. The results of plaintiffs' examination of said records appears in proposed Exhibit 1 of plaintiffs' answer to defendant's interrogatories. This Exhibit established the exact discrimination alleged by plaintiffs'. Plaintiffs compute damages as follows:

1. Plaintiff, LOMBINO & SONS, INC., actual damages computed as a result of price discrimination by computing price charged to plaintiff and lowest price charged to other competitors	$55,000.00
Damages for loss of business, dwindling of profits, increase in cost of production, general reduction in value of business, see Atlas Building Produce Co. vs. Diamond Block and Gravel Co., 269 F 2d 950 (10th cir. 1959)	$95,000.00
TOTAL	$150,000.00
TREBLE DAMAGES	$450,000.00
REASONABLE ATTORNEYS FEE	$ 50,000.00
TOTAL	$500,000.00

2. Plaintiff, COMO BROS., actual damages computed as a result of price discrimination by computing price charged to plaintiff and lowest price charged to other competitors $ 12,000.00

Damages for loss of business, dwindling of profits, increase in cost of production, general reduction in value of business, see Atlas Building Produce Co. vs. Diamond Block and Gravel Co. 269 F 2d (10th Cir. 1959.) $ 28,000.00

TOTAL $ 40,000.00
TREBLE DAMAGES $ 120,000.00
REASONABLE ATTORNEYS FEE 20,000.00
TOTAL $ 140,000.00

3. Plaintiff, THOMAS DeMARCO, actual damages computed as a result of price discrimination by computing price charged to plaintiff and lowest price charged to other competitors $ 2,500.00

Damages for loss of business, dwindling of profits, increase in cost of production, general reduction in value of business, see Atlas Building Produce Co. vs. Diamond Block and Gravel Co., 269 F 2d 950 (10th cir. 1959) $ 7,500.00

TOTAL $ 10,000.00
TREBLE DAMAGES 30,000.00
REASONABLE ATTORNEYS FEE 10,000.00
TOTAL $ 40,000.00

b. Defendant's position on liability and damages is that defendant did not discriminate in price in respect to plaintiffs' purchase of bananas.

1. In most instances the prices to plaintiffs were the same, or lower, than the prices to the majority of other purchasers of bananas from defendant.

2. Any differences in the price of bananas sold to wholesalers in New York City by defendant are attributable to one or more of the

following: a) the purchase of bananas of different grades and quality; b) the purchase of bananas at different times in a changing market; c) the purchase of bananas pursuant to defendant's promotional programs, which were available to plaintiffs; and d) the purchase of bananas remaining unsold after a vessel had discharged its cargo, which would sell at a reduced price.

3. No such differences in the sale of bananas to plaintiffs by defendant substantially lessened competition.

4. Even if plaintiffs could prove price discrimination which substantially lessened competition, they were not injured thereby and can prove no damages.

V. LIST OF WITNESSES

a. The following is a list of witnesses which the plaintiffs expect to call at the trial of this action.

1. Michael Lombino residing at 1568 78th Street, Brooklyn, New York (Expert).

2. Anthony Como, residing at 444 Fanning Street, Staten Island, New York (Expert).

3. Mr. & Mrs. Thomas DeMarco, residing at 261 Dante Avenue, Tuckahoe, New York.

4. Roger Sbrocco, residing at Glen Rock, New Jersey (Defendant's Sales Manager).

5. Andrew Russo, residing at 297 Hegeman Avenue, Brooklyn, New York (expert).

6. John Fedele, residing at Brooklyn, N. Y. (Expert).

7. Charles Palmer-Melville, N. Y. (Employee of Defendant).

8. R. David Havsey, C.P.A. (Expert), New York, N. Y.

9. Steven Elbaum, J. D., Brooklyn, New York

b. As defendant now understands plaintiffs' case, if necessary for defendant to put on a case, defendant intends to call the following as witnesses:

1. Roger Sbrocco, Glen Rock, New Jersey

2. Charles Palmer, Melvile, New York

3. David Hamlin Becker, 19 Rector Street, New York, New York (expert)

4. Mr. Hyman Cooper, 91 East 111th Street, New York, New York 10029 (expert)

5. Mr. John Georgallas, 420-422 Hunts Point Avenue, Bronx, New York 10459 (expert)

6. Mr. Vincent Sorge, 221 Miller Street, Newark, New Jersey (expert)

7. Mr. James Baboian, Store 53, Bronx Term, Market, Bronx, New York 10451 (expert)

8. Mr. Frank Russo, 33 Carroll Street, Brooklyn, New York 11231 (expert)

9. Mr. Peter Kalliches, 459 Route 17, Hasbrouck Heights, New Jersey 07604 (expert)

10. Mr. Joe Carollo, 40 Columbus Street, Bloomfield, New Jersey 07003 (expert)

11. Mr. Andrew Esposito, 1328 39th Street, Brooklyn, New York 11218 (expert)

12. Mr. Mike Paolillo, 596 Merrick Road, Lynbrook, New York (expert)

13. Mr. Al Allega, Bronx Terminal Market, Pier 2, Harlem River, New York, New York 10451 (expert)

14. Mr. Weston Lacoume, 50 California Street, San Francisco, California.

15. Mr. Edwin Del Beccaro, 50 California Street, San Francisco, California

16. Mr. Morris Toppila, 50 California Street, San Francisco, California

17. Mr. Anthony Conguista, 350 Vanderbilt Motor Parkway, Hauppage, New York

18. Ms. Joanne S. Solomon, 1 Chase Manhattan Plaza, New York, New York 10005

Plaintiffs and defendant reserve the right to call any other witnesses necessary to rebut any evidence or argument.

VI. EXHIBITS

a. Plaintiffs' exhibits:

1. PLAINTIFFS' PROPOSED EXHIBIT 1

This exhibit has previously been submitted to the Court and it has been agreed between the parties that it is an accurate, but incomplete, schedule of defendant's sales of bananas to wholesalers located in the New York City Metropolitan area during the period of March, 1968 through March, 1972.

This exhibit is not introduced to show all sales but only those sales which are alleged are discriminatory. This schedule is derived from schedules supplied by the defendant pursuant to the rules of discovery.

Defendant intends to object to plaintiffs' proposed Exhibit 1, as amended, at the appropriate time on the ground that it is an incomplete and selective schedule of competitive sales. Defendant reserves further objections to the admissibility of plaintiffs' proposed Exhibit 1 until the exhibit is offered at trial, when it will become clear for what purpose the exhibit is to be offered and upon what foundation.

2. PLAINTIFFS' PORPOSED EXHIBIT 2, 3, 4 etc.

Plaintiffs will at the time of trial offer into evidence various summaries and graphs illustrating sales to preferred customers. Said schedules and graphs have not been formulated at the present time but they will be derived from plaintiffs' proposed Exhibit 1.

At the present time, plaintiffs do not intend to introduce additional exhibits at the trial.

Defendant reserves the right to object to plaintiffs' proposed exhibit 2, 3, 4 etc. at the appropriate time, when it becomes clear for what purpose the exhibits are to be offered and upon what foundation.

b. If necessary for defendant to put on a case, defendant intends at this time to offer the following exhibits in evidence at the trial.

1. The schedule of defendant's sales of bananas to wholesalers located in the New York City metropolitan area during the period March 28, 1968 to and including March 28, 1972 in the form attached to the Request.

Plaintiff has no objection to this exhibit.

2. All promotional materials distributed by defendant to the wholesale trade for the New York City metropolitan area during the period March 28, 1968 to and including March 28, 1972.

Plaintiff objects to this exhibit as self serving and reserves right to further objection upon inspection of said exhibit.

3. Plaintiffs' income tax returns for the years 1966 through 1969; and in addition, plaintiff Lombino's tax returns for yrs 1970

through 1972, inclusive, and plaintiff Como's tax returns for 1970.

Plaintiff objects to this exhibit as irrelevant.

4. Federal Trade Commission Trade Practice Rules for the Fresh Fruit and Vegetable Indestry, promulgated April 5, 1965;

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

5. Memorandum from Roger Sbrocco to E. Del Beccaro dated April 4, 1968 and related communications.

Plaintiff objects to this exhibit as self serving.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

6. Notations of defendant's seaboard price quotations for the period to the extent they exist.

Plaintiff objects to this exhibit as self serving.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

7. Plaintiffs' customer claims, requests for credit, and credit memoranda in respect to plaintiffs' purchases from defendant during the period.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

8. Defendant's voyage pouches for each shipment of defendant's bananas to the metropolitan area during the period to the extent they exist.

Plaintiff objects to this exhibit as self serving.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

9. Defendant's customer sales reports and back-up billing sheets and telexes in respect to bananas sold during the relevant period.

Plaintiff objects to this exhibit as self-serving.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

10. Summaries and graphs illustrating certain of the data described above.

Plaintiff objects to this exhibit as self serving.

Plaintiff reserves the right to object to this exhibit at the appropriate time when it becomes clear for what purpose the exhibit is to be offered and upon what foundation.

VII. ISSUES TO BE TRIED

Plaintiffs and defendant are unable to agree upon the issues to be tried.

a. It is plaintifts' position that the following are the issues to be tried.

1. Do the price differences, indicated by the defendant's records, constitute illegal price discrimination as charged in the complaint.

2. If said price differences, constitute illegal price discrimination, were plaintiffs' damaged thereby and if so in what amount were plaintiffs damaged.

3. Has defendant raised valid defenses under the Robinson-Patman Act?

b. The defendant's position is that the following issues are to be tried.

1. Whether defendant illegally discriminated in price in respect to sales of bananas to plaintiffs in violation of the Robinson Patman Act.

Were the bananas purchased by plaintiff of like grade and quality to bananas purchased by those who paid lower prices?

ii. Were said price differences attributable to differences in the time of purchase?

iii. Were said price differences attributable to defendant's promotional programs?

iv. Were said price differences attributable to the purchase of bananas remaining unsold after a vessel had discharged its cargo?

2. If so, did such discrimination substantially lessen competition?

3. If so, were plaintiffs' injured?

4. If so, were plaintiffs' damaged, and in what amount?

Dated: New York, New York 1974
September 12, 1974

So Ordered 9-12-74

s/ Constance Baker Motley
U.S.D.J.

CONSENTED:

/Richard J. Sgarlato
Richard J. Sgarlato
Attorney for Plaintiffs

Milbank, Tweed, Hadley & McCloy
by Russell E. Brooks
Attorneys for Defendant

TRANSCRIPT OF PROCEEDINGS BEFORE MOTLEY, D.J. ON JULY 9 and 10, 1975 (TRIAL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO, d/b/s COMO BROS., and THOMOS DEMARCO, Plaintiffs, vs. STANDARD FRUIT & STEAMSHIP CO., Defendant.	Before: HON. CONSTANCE B. MOTLEY, District Judge 72 CIVIL 1263

New York, July 9,10, 1975

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO, d/b/s COMO BROS., AND THOMQS DEMARCO, Plaintiffs,	:	
vs.	:	72 Civ. 1263
STANDARD FRUIT & STEAMSHIP CO., Defendant.	:	

Before:

HON. CONSTANCE BAKER MOTLEY,
District Judge

New York, July 9, 1975;
10.00 o'clock a.m.

APPEARANCES:

RICHARD SGARLATO, Esq.,
ANDREW GOLDSTEIN, Esq.,
Attorneys for Plaintiffs.

MILBANK, TWEED, HADLEY & McCLOY, Esqs.,
Attorneys for Defendant;
BY: RUSSELL E. BROOKS, Esq.,
EUGENE F. FARABAUGH, Esq.,
MS. JOANNE SOLOMON, Esq.,
Of Counsel.

(Case called.)

MR. SGARLATO: Your Honor, the plaintiff has an application to make.

MR. BROOKS: The defendant is ready, your Honor.

MR. SGARLATO: Your Honor, the plaintiff is ready at the present time, but I do have an application I would like the Court to consider.

THE COURT: What application is that?

MR. SGARLATO: I find myself in a very unique situation. I realize I was on 24-hour call. I have a client who is a registered nurse. Her license has been suspended. The suspension will take effect at the end of this week, your Honor. Yesterday I drew up some papers for reconsideration and the Board of Regents is meeting todat at 12 o'clock. If I don't get to that hearing today, they will not meet again until August and her license will have been suspended by that time, and it wouldn't make any difference whether I appear at that time or not.

The hearing will take approximately 15 minutes, your Honor. It is just an application for reconsideration.

THE COURT: Where is this place located?

MR. SGARLATO: It is at 261 Madison Avenue,

your Honor. If I get in before lunch I could be back by two o'clock.

THE COURT: Let's see. This case was called for trial last week, wasn't it?

MR. SGARLATO: Yes, your Honor.

THE COURT: And somebody requested an extension at that time.

MR. SGARLATO: That was the defendant, your Honor.

MR. BROOKS: That was me, your Honor. I was engaged in a trial before Judge Carter at that time.

THE COURT: And then there was somebody before an Arbitration Commission.

MR. BROOKS: That was scheduled to occur when my trial before Judge Carter ended. I set that out in the letter. Your Honor was kind enough to schedule this event after the conclusion of the arbitration, and I thank you for your consideration.

THE COURT: Mr. Sgarlato, we have been trying to get this case to trial for a long time now.

MR. SGARLATO: Your Honor, if I may, if I could leave by 11.30 I could be back by 2 o'clock.

THE COURT: That is too much time. How far up Madison Avenue is that?

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MR. SGARLATO: It is in the 40's or 50's, your Honor. I don't recall -- no, it's around 35th Street, I believe. It is very important to this young lady. This is her last opportunity to retain her license as a nurse. I think her case has merit and the suspension will take effect.

THE COURT: She's been suspended and you are asking for reconsideration of that suspension?

MR. SGARLATO: Yes, your Honor.

THE COURT: Why can't that be done in writing, with the reasons set forth?

MR. SGARLATO: Because, your Honor, I am doing it, we received notice of this suspension on Friday and I am not supposed to have an opportunity to appear before the Board of Regents, it is meeting today. But I have submitted papers yesterday in an unorthodox manner to get and get into this hearing that they are having today.

THE COURT: You don't know whether they will hear you; is that right?

MR. SGARLATO: No, your Honor.

THE COURT: The application is denied. I thought you had a fixed hearing. You could do that in writing. Your application is denied.

Call your first witness.

MR. SGARLATO: Michael Lombino --

MR. BROOKS: Your Honor, if I may, we delivered to your chambers a trial memorandum this morning. I don't know whether that has reached you or not. I would like to deliver to Mr. Sgarlato a copy of it. I have a copy for your Honor if you haven't caught up with one in your chambers.

THE COURT: Yes, I have it.

Does plaintiff have a trial memorandum?

MR. SGARLATO: Yes, your Honor. I also have a list of witnesses that your Honor requested.

(Handing.)

THE COURT: Do you have a list of witnesses, Mr. Brooks?

MR. BROOKS: Yes, we do.

THE COURT: And a list of documents in the order in which you intend to introduce them?

MR. BROOKS: Roughly in the order in which we intend to introduce them.

THE COURT: All right. As long as we have a list so that the clerk and the reporter can know what the document is.

Have you given each document a number?

MR. BROOKS: A letter, your Honor.

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THE COURT: What about the plaintiffs' list?

MR. SGARLATO: Your Honor, I don't have a list of exhibits. I have numbered each exhibit with the labels given to me by the clerk.

THE COURT: How many exhibits do you have?

MR. SGARLATO: I have five exhibits, your Honor. Four of them are charts and one of them is a tape, a compilation that I made.

THE COURT: Do you have a list of your witnesses?

MR. SGARLATO: Yes, I gave that to the clerk.

THE COURT: All right.

Let's start with the first witness.

MR. SGARLATO: Mr. Lombino.

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M I C H A E L L O M B I N O , called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Lombino, will you tell us what your occupation is?

A I am in the wholesale banana business.

Q What is the name of the company by whom you are employed?

A Lombino & Sons, Inc.

Q What is your position in that company?

A Vice-president and treasurer.

Q Are you a shareholder?

A Yes, sir.

Q Are you the only shareholder?

A No. My wife owns 50 per cent of the business.

Q And you own 50 per cent of the outstanding shares?

A Right.

Q Mr. Lombino, would you tell us how long you have been in the wholesale banana business?

A 40 years.

Q During that time have you dealt with different

types of bananas?

A I don't follow you, when you say dealt with.

Q I will rephrase the question.

During the 40 years that you have been in the wholesale banana business have you handled as a wholesaler different types of bananas?

A Whatever bananas came into the Port of New York I handled it.

Q Did you ripen --

MR. BROOKS: Move to strike the answer as unresponsive, your Honor.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: Do you want to respond to the question now?

Do you understand the question? Do you want the question reread?

Read the question to the witness, please.

(Question read.)

A I have handled whatever bananas that the importers brought into the Port of New York, whether it was Standard Fruit, United Fruit, Pacific Fruit, or West Indies Fruit.

MR. BROOKS: Same motion, your Honor.

THE COURT: Read the answer, Mr. Reporter.

(Record read.)

THE COURT: Overruled.

Q Mr. Lombino, during the 40 years in which you have been in the business in the wholesale banana industry, have you ripened bananas?

A I have.

Q And have you been involved in every aspect of the wholesale banana business yourself, personally?

A I have.

Q And are you familiar with the differences between different types of bananas?

A I am.

Q And can you tell us the way bananas are packaged now when you receive them from a distributor such as Standard Fruit & Steamship Company?

MR. BROOKS: I object to the question. It is dircted to 1975. The case ends in 1972.

THE COURT: Yes.

MR. SGARLATO: Your Honor, I am attemptint to qualify the witness at this time.

THE COURT: As an expert in the handling of bananas?

MR. SGARLATO: Yes, your Honor.

THE COURT: He's been in the business 40 years; is that right?

MR. SGARLATO: Yes, your Honor.

THE COURT: And he's testified that he handled bananas from all kinds of ports; is that it?

MR. SGARLATO: Yes, your Honor.

THE COURT: All right. That is sufficient, isn't it? If he's been in that business for 40 years on a regular basis.

Have you been in that business on a regular basis?

THE WITNESS: Yes, your Honor.

MR. SGARLATO: Thank you, your Honor.

Q Now, Mr. Lombino, will you describe the nature of Lombino & Sons, Inc., the nature of the business they are involved in?

A The nature of my business now and before was to ripen bananas and sell them to small individual jobbers, hotels, restaurants, and chain stores.

Q Do you have competitors in this business?

A Any jobber who is out on the street who processes bananas like I do is a competitor.

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Q Are you referring now to what area, Mr. Lombino?

A Whatever area I cover. Right now I'm covering midtown and downtown Manhattan.

Q From the period 1968 through 1972, what area did your business cover at that time?

A At that time I covered Brooklyn, Long Island City, midtown Manhattan and the Bronx.

Q Do you know the names of any of your competitors during the period 1968 through 1972?

A I do.

Q Will you give us some of these names, if you can recall them?

A Well, you've got one J. Esposito & Sons, who is a jobber like myself; you have Frank Russo who is a jobber like myself; that's in Brooklyn, in the Brooklyn area.

In the New York area, you got D. Loi & Company, you have American Banana Company, you got Banana Distributors of New York and you got Stricks & Schwartz. That's about it.

Q You don't recall any others?

A There is a couple of small ones. I just can't think of their names right now.

Q During the period 1968 through 1972, can you tell us where you purchased your bananas, from whom?

A I purchased from Standard Fruit, West Indies Fruit

and United Fruit.

Q For this period, 1968 through 1972, approximately what percentage of the bananas you purchased were from Standard Fruit?

A They got about three-quarters of my business.

THE COURT: United Fruit got three-quarters?

THE WITNESS: Standard Fruit.

Q Standard Fruit Steamship Company is the same company that is a defendant in this lawsuit; is that correct?

A Right.

Q Was there any specific type of banana you purchased from Standard Fruit Steamship Company?

A Well, generally I always used to buy the Ecuador bananas.

Q Did you occasionally buy other types of bananas?

A Yes, if the Ecuador bananas didn't arrive in New York that week, I would buy Honduras or Costa Rica.

Q Can you tell us the procedure which you followed when you ordered bananas?

THE COURT: From whom?

Q From Standard Fruit.

A Well, I would call up and find out what shipments were arriving in New York the following week, and I would tell them I would need so many boxes, and I would place my

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order with the manager of the New York office, and he would fill my order.

Q Was there any one specific salesman that you spoke to when you called up Standard Fruit?

b2 A I used to do most of my talking with Roger Sprocco.

Q When you called Mr. Sprocco, did you request from him a certain type of banana other than Ecuador bananas or bananas that come from a different region?

A Well, I used to ask him what variety or fruit was arrived in that week and if he told me he had the Ecuador bananas, that's what I requested.

Q If he did not have Ecuador bananas, what type of bananas would you purchase then?

A If they had Honduras, I would have to buy Honduras; if they had Costa Rica, I would have to buy Costa Rica.

Q Is there a difference between these types of bananas?

A There is.

Q Is one more expensive than the other, Mr. Lombino?

MR. BROOKS: I object to the question, your Honor.

THE COURT: On what grounds?

MR. BROOKS: Because it asks an absolute question which can only be answered in relative terms, is one more expensive than the other. When, under what conditions, today,

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always, sometimes?

THE COURT: Let's limit it to the time in question, 1968 through '72.

Did you purchase Costa Rica bananas then?

THE WITNESS: Yes, your Honor.

THE COURT: Were they more expensive than what?

MR. SGARLATO: We were comparing Ecuador, Costa Rica and Honduras, your Honor. I asked him if there was a difference between these, your Honor.

A That's hard to say. Whatever the market was due at the time. If the market was a firm market, you paid as much for the Costa Rica bananas as you did for the Ecuador. The reason why I requested Ecuador instead of Costa Rica or Honduras, because it's a more hardier banana. It can take a little more abuse than the Costa Rica and Honduras quality.

Q Within the category of Ecuador bananas, were there certain types of Ecuador bananas that were superior to others?

THE COURT: Was the question answered? I thought you were asking him whether Costa Rica bananas were more expensive than bananas from other places.

MR. SGARLATO: He answered the question, your Honor.

THE COURT: Read the answer, Mr. Reporter.

(Record read)

THE COURT: Does that tell you whether Costa Rica bananas are more expensive?

MR. SGARLATO: Your Honor, he said it depends on the market.

All right, I will go into it further.

THE COURT: I thought you were talking about some specific differential in price, were you not?

MR. SGARLATO: No, your Honor. It depends on the market. I was going to develop on this point further, your Honor, by going into what I was going to go into next. It's all related.

THE COURT: All right.

BY MR. SGARLATO:

Q Mr. Lombino, within the category of Ecuador boxes, are there certain types of Ecuador bananas that are superior to other types of Ecuador bananas?

MR. BROOKS: I object to the question, your Honor. Mr. Sgarlato has used the term "Ecuador boxes" which I don't believe the court has had a definition for, yet.

MR. SGARLATO: I will rephrase it.

Q Mr. Lombino, in the category of Ecuador bananas, taking into consideration all types of Ecuador bananas, are there certain bananas from Ecuador superior to other bananas from Ecuador?

A No, there is no superior brand of Ecuador bananas coming in, unless the company packs them special. But, an Ecuador banana coming out of Ecuador is and Ecuador banana.

Q Does Standard Fruit & Steamship Company package superior types of bananas from Ecuador?

A I wouldn't phrase it superior. What Standard Fruit & Steamship Company was doing for a while, they were making a particular pack which they were calling their -- I have it right on the tip of my tongue, I just can't remember the name, get the name out. Anyway, with this particular banana, they were getting all the large size bananas and putting them in this here package, banana box and selling them -- Premium Banana, that was the name of the box. And that there you pay a premium price for because they were taking the cream of the bananas and putting them into this box and getting a premium price for it.

Q Did Standard Fruit & Steamship Company sell a type of banana known as Imperial?

A Yes.

Q And would that be the same as Premium?

A No.

Q What would the difference be?

A Well, the Imperial label on that box was originally--

it belonged to another shipper and when he died, Standard Fruit & Steamship Company took over that allotment of that grower out of Ecuador and they kept the same name, which was Imperial Box. And, they brought it up.

Q Was that type of banana priced higher than regular Ecuador bananas?

A Not necessarily.

MR. BROOKS: I object and move to strike the answer. I don'tthink it's responsive.

THE COURT: Again, we are not really getting any responsive answers from this witness. You asked him if something was priced higher and he said "Not necessarily." Is that an answer to whether something is priced higher? It should be yes or no, shouldn't it?

MR. SGARLATO: Yes, your Honor.

Q Mr. Lombino, is there a label that Standard Fruit & Steamship Company gives to its Ecuador bananas, the ones that are not premium bananas?

MR. BROOKS: Could we assume this relates to the '68-'72 period?

A Would you repeat that question again, counsel?

Q I will rephrase that question.

Does Standard Fruit & Steamship Company sell the type of banana which they refer to as Ecuador boxes?

A All their bananas that come in from Ecuador says "Ecuador boxes" on them.

Q And when you receive an invoice from Standard Fruit & Steamship Company and you have purchased premium, would the invoice reflect Ecuador premium?

A Yes, it would.

Q And would that price be higher than Ecuador boxes?

A Yes, it would.

Q Let's assume you purchased Imperials. Would that price be higher than Ecuador boxes?

A No.

Q It would be the same price?

A That's right.

Q Would that be the same grade and quality of banana?

A About the same.

Q When you receive that invoice, would Standard Fruit & Steamship Company refer to Imperials?

A That I'm not sure of whether they had on their invoice Imperial boxes or not. But, my bills would show that if they stipulated that on the invoice, the invoice they sent me after I made my purchase.

b3 Q Mr. Lombino, I am going to show you two papers. Would you take a look at those.

xx (Plaintiffs' Exhibits 1 and 1A marked for

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identification.)

MR. SGARLATO: They will not be offered in evidence, your Honor.

Q There are two papers there. Would you tell us what they are, Mr. Lombino?

A All right. They're two invoices from Standard Fruit & Steamship Company.

Q What are the dates?

A Dated 7/16/69.

Q What is the date on the other bill?

A The date on the other bill is 7/23/69.

Q Mr. Lombino, when Standard Fruit & Steamship Company billed you on those dates, how did they refer to the bananas which you purchased?

MR. BROOKS: Your Honor, if the question is asking the witness to simply read the document, I suggest the document speaks for itself.

THE COURT: If you want to offer that in evidence--

MR. SGARLATO: I will rephrase the question.

Q Did those invoices refresh your recollection, Mr. Lombino?

A Yes, these bills, one is for Ecuador Premium and one for Gros Michel.

MR. BROOKS: Your Honor, I move to strike the answer because it's simply reading from the document.

THE COURT: Do you want to offer those documents in evidence?

MR. SGARLATO: No, your Honor. I will withdraw the question and rephrase it again.

THE COURT: No, he's already given us the answer. He looked at the document and read from it. If the document is in evidence, he can read from it.

Do you want those in evidence?

MR. SGARLATO: I will offer them in evidence.

THE COURT: Any objection?

MR. BROOKS: I haven't seen them, your Honor.

THE COURT: All right. Let your opponent see them.

(Pause.)

MR. BROOKS: Your Honor, there is some handwriting on the bottom of the documents. Some of it in blue ink, some of it in red. I think we should find out how that got on there and whether the witness can tell us what it is.

THE WITNESS: May I see it, please?

THE COURT: Yes, let the witness see it.

Do you have something specific in mind?

THE WITNESS: Yes, your Honor. This here in red here, "Okay, MAL", that is my signature on the bill that would give my bookkeeper notification that I received this here merchandise.

This P-60 is the page that she entered it in her ledger that when she invoiced it in our book.

THE COURT: What about the next one?

THE WITNESS: And underneath here it is check number 7542, which was the check number that was paid, the check number that paid this bill and the date that it was paid.

THE COURT: What about the next one? Is there writing on the next one?

THE WITNESS: Every one will have writing, your Honor.

MR. BROOKS: What is the recalculation of the numbers on one of those, in ink?

THE COURT: The recalculation of certain numbers?

MR. BROOKS: Yes. There is a total and then there are numbers added or subtracted to it. And then I believe another total, reached in ink.

THE COURT: Which one?

MR. BROOKS: I'm not sure whether it is the

first or the second.

THE WITNESS: Yes. Well, probably this here was another bill that she paid because this bill was $1295.04, and probably the previous bill was $2,086, which came to a total of $3381.04 which she paid on check number 7542. That's all that the written ink notation is, for my bookkeeper's record and the red, Okay MAL is her authority to enter it and pay it because it's my signatre on it that I received the merchandise. That's all it is on these bills.

THE COURT: It will be received.

(Plaintiffs' Exhibits 1 and 1-A were received in evidence.)

xx THE COURT: Now do you want to ask him something about this exhibit? If so, let us proceed.

Q Mr. Lombino, those exhibits would reflect the terms used by Standard Fruit & Steamship Company, is that correct?

MR. BROOKS: I object to the question. The exhibits speak for themselves. What Mr. Lombino can add as to what Standard Fruit & Steamship Company does cannot go beyond what is in the exhibit.

THE COURT: You are asking whether these are the bills he gets from Standard Fruit?

MR. SGARLATO: Yes, your Honor.

A Yes, those are the bills I received from Standard Fruit.

Q Mr. Lombino, when you purchased bananas from somewhere other than Ecuado, do you recall what names Standard Fruit & Steamship Company would give to other types of bananas?

A Well, if I purchased bananas from Honduras, they would be their Honduras bananas. And if they were purchased coming out of Costa Rica, they would be their Costa Rica bananas. It's the section where the bananas grow, your Honor.

Q Mr. Lombino, to your knowledge does Standard Fruit & Steamship Company sell a type of banana known as boxed bananas?

MR. BROOKS: Does this pertain to the four-year period in question?

Q Yes, during the four-year period in question.

THE COURT: Let us assume that all these questions relate to the period 1968 to 1972. You understand that, Mr. Lombino?

THE WITNESS: Yes, your Honor.

THE COURT: When he asks you a question, that is what he is talking about. He asked you whether in

that period of time the defendant sold boxed bananas, is that it?

Q Yes, a type of banana referred to by Standard Fruit & Steamship Company as boxed bananas, to your knowledge, if you know?

A Everything comes in a box, Counselor. Everything comes in a box.

Q Mr. Lombino, do you know whether or not they sold a type of banana which they referred to as boxed banana, yes or no?

A No.

Q Do you know whether or not they sold a type of banana which they referred to as Honduras W?

A No.

Q You don't know?

A No.

Q Do you know if they sold a type of banana which they refer to as Honduras clusters?

A Yes.

Q How about Cabanito boxes?

A Yes.

Q Costa Rica cabanas?

A Yes.

Q Costa Rica bananas?

A Costa Rica what? Bananas?

Q Yes. The first one was Costa Rica cabanas. How about Costa Rica bananas?

A Yes.

Q Ecuador Dole?

A Yes.

Q Ecuador boxes?

A Yes.

Q Ecuador flavor pack?

A Yes.

Q Ecuador premium boxes?

A Right.

Q Imperial GM?

A Yes.

Q Cabana boxes?

A Yes.

Q Ecuador cabanas?

A Yes.

Q Honduras Y, Hondural Yellow or Honduras Y?

A Yes.

Q Honduras Dole?

A Yes.

Q Top clusters?

A Top clusters?

Q Yes. Are you familiar with that?

A I never bought them, Counselor, so I never went into that detail, so I couldn't tell you if they came in with them or not.

Q Do you know if they sell them?

A I wouldn't know.

Q Plantains?

A Yes.

Q Are they bananas?

A They are cooking bananas.

Q Honduras snacks?

A Never handled them.

Q Honduras cabana?

A I have had them.

Q Yes?

A Yes.

Q Honduras flavor pack?

A Yes.

Q Honduras cabana cluster?

A Yes.

Q Honduras blues?

A Yes.

Q Tropic pack?

A Yes.

Q Consumer pack?

A Yes.

Q Mr. Lombino, all of these types of bananas which you say you are familiar with, did you ever purchase that type of banana, would your invoice refer to the type of banana by using a name, such as the name I have given you?

A Well, I know on the premium my invoice would state premium pack. On the Imperial Gros Michel it comes on --

MR. SGARLATO: Your Honor, at this time I would like to ask defense counsel to stipulate this, because we have gone over this before and it would save a lot of time, otherwise I will have to offer into evidence a lot of invoices which will show this and defendant's records which I have gone over.

THE COURT: What do you want him to stipulate to?

MR. SGARLATO: I would like the defendant to stipulate that the defendant's invoices and IBM runs do refer to these different categories of bana as.

THE COURT: Sold to this plaintiff?

MR. SGARLATO: Sold to this plaintiff or other wholesale distributors in the New York area.

THE COURT: In other words, you want him to stipulate that the defendant sells various kinds of bananas as you have indicated?

MR. SGARLATO: Yes. And that he refers to these bananas by the names that I have just mentioned on the list that I read.

THE COURT: On the invoices?

MR. SGARLATO: Yes, on the invoices.

THE COURT: Can you so stipulate, Mr. Brooks?

MR. BROOKS: I am checking, your Honor.

(Pause.)

MR. BROOKS: I understand counsel wants us to stipulate the list of types of varieties of bananas that he read into the record are reflected on the defendant's invoices and IBM runs when they are sold to the particular customer; is that correct?

MR. SGARLATO: Yes.

MR. BROOKS: I will stipulate that.

MR. SGARLATO: Thank you, Mr. Brooks.

Q Mr. Lombino, when you purchased bananas from Standard Fruit & Steamship Company during the period 1968 through 1972, to your knowledge at any time did Standard Fruit & Steamship sell to you bananas at one price and sell bananas from the same ship, of the same grade and

quality to one of your competitors at a different price?

A They have.

Q Can you tell me from the period 1968 through 1972 --

THE COURT: You mean from 1968 to 1972?

MR. SGARLATO: Through, your Honor, I am sorryi Through 1972.

Your Honor, all of these questions here involve the period March, 1968 through the period March, 1972.

THE COURT: We agreed to that about seven minutes ago.

MR. SGARLATO: Yes, your Honor.

Q Mr. Lombino, throughout that period could you tell us approximately how often this occurred?

A On numerous occasions.

Q Can you tell us how you know this to be true?

A I know it to be true by your IBM runs that was taken.

Q When you say IBM runs, do you know whose records they are?

A Records of Standard Fruit & Steamship Company.

MR. BROOKS: Your Honor, I move to strike the answer. Apparently the witness is simply reciting something which he learned from counsel's production to him

after the events of documents that counsel has gained in the course of discovery in this case. And if that is the source of the plaintiff's knowledge, I think the documents should speak for themselves. I don't think he is telling us any knowledge that he learned contemporaneously.

THE COURT: Is that so?

THE WITNESS: He is wrong, your Honor. He is very wrong.

THE COURT: Proceed.

Q Mr. Lombino, can you tell us in the course of your business did you obtain any knowledge of a difference in price while you were working?

A I have.

Q Can you tell us the circumstances under which this occurred?

A Well, I had a run in Brooklyn that I used to sell small supermarkets, small grocery stores and individual home owner stores, and every time my drivers would go into a store and price a box of bananas to them, they were always buying them anywhere from a quarter to 75 cents cheaper than I could sell them with my legitimate markup on it. And my drivers would come back to me and say Mike, they are buying them for three and a half and you want four and a quarter, or three and a half and they can

buy them for two and a half or three dollars.

THE COURT: I didn't understand that.

MR. BROOKS: Move to strike it, your Honor. It is unresponsive.

THE COURT: Overruled.

Will you explain what you mean when you said you had a run in Brooklyn, what that means?

THE WITNESS: I had 40 or 50 individual stores that I used to take care of in Brooklyn.

THE COURT: That you sold bananas to?

THE WITNESS: That I sold bananas to as a jobber. My drivers would go into these particular customers with a box of bananas at a price and when the driver would get to the store the fellow would say look, another banana man was here and he only wants three and a half; how come you want four and a quarter? Every time we went into the stores we were always underpriced on the same box of bananas that my driver was bringing into the store.

THE COURT: By one of your competitors.

THE WITNESS: Right.

THE COURT: That you named before? That is Esposito or Russo.

THE WITNESS: Right, your Honor.

MR. BROOKS: Your Honor, I renew my motion. The question of counsel was whether he knew that Standard Fruit had given to a competitor a price better than to Mr. Lombino. Mr. Lombino has told us now that he knows of instances where a competitor was offering a customer that they were competing for a better price than Mr. Lombino was willing to offer. That is not responsive to the question whether Standard gave to that competitor a different price.

THE COURT: I didn't understand the question to ask whether Standard. I thought the witness was being asked whether he knew generally, is that so?

MR. SGARLATO: Yes, your Honor. I am trying to develop how that came about.

THE COURT: Related to Standard?

MR. SGARLATO: Yes, your Honor. Relating to Standard's sale of bananas to Mr. Lombino's competitors.

THE COURT: I see. He hasn't told us, then, whether he knows through his drivers that the lower priced bananas had been sold to his competitors by Standard.

MR. SGARLATO: I will go into that.

Q Mr. Lombino, have you ever been in one of these stores and been faced with this situation where one of your competitors had been there prior to you?

A I have.

Q How could you tell their bananas which they had left were from Standard Fruit & Steamship Company?

A It's marked right on the box, Counselor.

Q Can you tell the grade and quality of that banana from the box?

A Yes, you can.

Q And these bananas that you were referring to, were they of the same grade and quality as the bananas you were selling?

A That's right.

Q Did you look at the bananas themselves?

A Well, I looked at one or two. I mean, the fellow won't let me go through all he bought and show me every box. But with the experience that I have in the business, Counselor, just picking up a cover I can see whether the box of bananas is a good box of bananas or not.

Q Mr. Lombino, can you tell by picking up the cover and looking at these bananas approximately when your competitor or from which ship your competitor would have received these bananas from, referring to the age of the banana now?

A It was fresh merchandise. It wasn't some-

thing that was dead that he had to get rid of at a price, otherwise he'd have to dump it.

MR. BROOKS: Your Honor, I again move to strike this whole line. It's designed to show that the competitor received a better price from Standard than Mr. Lombino. All Mr. Lombino is able to tell us is that a customer, a grocery store was getting a better price from the competitor than Mr. Lombino was willing to give. It doesn't tell us anything about the price at which Standard was selling to the two competitors, that is, Mr. Lombino and the gentleman that had preceded him and beaten him to the sale.

THE WITNESS: Your Honor, if the competitor who beat me to the sale sold the same bananas that I was selling at a half a dollar to seventy-five cents a box cheaper than I was selling, the same banana from the same company, something is wrong. I mean, the competitor of mine isn't going to go out and sell bananas, undersell himself just to sell bananas. We are all out to make a living.

MR. BROOKS: That is an inference.

THE COURT: The objection is overruled.

MR. SGARLATO: Your Honor, I think we should go into the course factor, which I will do.

Q Mr. Lombino, after purchasing the bananas from Standard Fruit & Steamship Company how much of a markup do you make when you sell it to one of your customers? What is your profit?

A You work on $1.20 a box.

THE COURT: That is profit?

THE WITNESS: That is gross, your Honor.

THE COURT: Gross profit. In other words, you mark it up $1.20. Whatever it cost you, you mark it up $1.20.

THE WITNESS: Right.

Q Out of that $1.20, what is your net profit, Mr. Lombino?

A About 20 cents.

Q And you have testified that your competitors were selling bananas for 50 cents and 75 cents less than you; is that correct?

A That's right.

Q Mr. Lombino, what are rollers?

A Rollers is a term that importers use when they have excess fruit. They load it on freight cars or they load it on trains and after the day's sale is over they try and sell it at a reduced price.

MR. SGARLATO: Your Honor, before we proceed,

I notice there is a gentleman in the courtroom. If he is a witness in this case I would ask that he be excluded.

THE COURT: Are you a witness in this case?

MR. BROOKS: Your Honor, this is Mr. Sbrocco, who is an officer of the corporate defendant who has responsibility for this case. He will be a witness, but I argue to the Court that he is entitled to be here as a representative of a party defendant, just as much as Mr. Lombino or the other plaintiffs are entitled to be here.

THE COURT: What is his position with the company?

MR. SBROCCO: Sales manager at the time, your Honor. I am now the area sales manager.

MR. BROOKS: Area sales manager, including the metropolitan area.

THE COURT: All right. He can stay.

Q Mr. Lombino, referring to these rollers now, or leftover bananas, to your knowledge did Standard Fruit & Steamship Company ever sell leftover bananas during the period 1968 through 1972?

A Sold to who, to me?

Q Sold to any of the wholesale distributors in the New York City area?

A They certainly did.

Q Can you tell me approximately how often rollers would be available?

A Rollers would be available according to the condition of the market. In the summertime if there was an overabundance of bananas brought into the Port of New York they always had extra excessive fruit left over.

Q Can you give us some sort of averate how many times a month they would be available or how many times a year, on the average, taking everything into consideration, including market conditions?

A I'd say about three months out of the year you would have rollers available.

Q That would be every three weeks for approximately three months out of a year?

A Every week at certain times of the year.

Q Are these rollers sold at a price less than the other bananas from that shipment, of the same grade and quality?

A They are.

Q Can you tell me to your knowledge approximately how much less per box would these rollers be sold?

A They can go from 40 cents -- let me rephrase it a different way. They could be sold from a quarter

a box up, where I have seen them sold for 25 cents a box.

MR. BROOKS: Your Honor, I argue that the answer is not responsive. The question was how much less than the regular sale would a roller go for and the answer was they could be sold from 25 cents a box up. We don't know how that relates to the price of the regular price at this time.

THE COURT: You meant the entire box was sold for 25 cents?

THE WITNESS: Yes, your Honor.

Q Mr. Lombino, to give the Court an example, what would the price of a box of bananas be? Can you give us a range?

A For argument's sake --

Q This is the cost to you, now?

A If I pay $4 for bananas that particular ship and they had rollers on that ship, those bananas could have been sold anywhere from three and a quarter down.

Q Down to 25 cents a box?

A Well, yes. You can phrase it that way. Down to a quarter a box, according to the variety of fruit that is in that roller.

THE COURT: Let me ask you this:

How large is a box?

THE WITNESS: 40 pounds, your Honor. There is 40 pounds of bananas packed in each individual box. When they load a freight car or a trailer for a roller they can put anywhere from seven to a thousand boxes on a trailer or a freight car, and they sell it as a roller, as excess fruit.

Q Mr. Lombino, do you know the manner in which Standard Fruit & Steamship Company would dispose of its rollers?

A The branch manager has a list of all the accounts and he would call up your bigger jobbers who can absorb extra fruit and they would be the ones who would buy it.

Q Did you ever request rollers from the period 1968 to 1973?

A I wouldn't call them rollers. I used to call them tie-ups, because at certain times they would load small trucks with anywhere from three to four hundred boxes that was excess fruit and sell them at a cheaper reduced price.

Q They are leftover bananas, is that correct?

A Right.

Q Excess?

A Excess.

Q Did you ever request these excess bananas from that period?

A A number of times.

Q You say a number of times. Throught the period '68 through '72, how many times?

A Any time they had excess fruit I was available to take it.

MR. BROOKS: Move to strike the answer, It is not responsive.

THE COURT: Yes.

Can you giv us your best estimate of how many times during the period in which you purchased excess fruit.

THE WITNESS: Well, your Honor, about three months of the year you have excess fruit. Out of that three months of the year you got two ships a week, so that is 12 ships. About 25 times a year.

THE COURT: All right.

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MR. BROOKS: Your Honor, I don't think we have had an answer to the question how many times he requested--

THE WITNESS: Every time there was any excess fruit, I was available for it.

MR. BROOKS: But did you make an inquiry, telephone call?

THE COURT: His testimony was they would call him.

THE WITNESS: Every time I spoke to the branch manager, and I knew that the market was on the sloppy side, as the trade word goes for it, I would ask is there any extra fruit and the answer I got, "If there is any available, I'll call you."

Q Mr. Lombino, how many times in that period, approximately, did you actually receive these excess bananas?

A Half a dozen times.

Q You say they were available about 25 times a year?

A That's right.

Q And throughout that period of four years, that would be a hundred times and you said they made them available to you about six, is that correct?

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A That's right.

Q Do you know of any other, specifically, any other wholesale distributor that used to purchase rollers on a regular basis?

A I do.

Q Can you give us the name or names of that other competitors?

A Yes. Frank Russo in Brooklyn. He never put an order in unless there was excess fruit and if the company had excess fruit, his place was the dumping ground.

MR. BROOKS: Your Honor, I move to strike the answer. I don't think it's competent evidence. It sounds very much like hearsay.

THE COURT: Yes, it does. How do you know that?

THE WITNESS: Your Honor, the prices that the man would sell the stuff, he wasn't buying bananas for $2 and selling them for $2. I mean, the man has a big operation, has an expense and everything.

MR. SGARLATO: Your Honor, I will develop it.

THE COURT: All right.

Q Mr. Lombino, throughout the period of 1968, 1969, did you ever visit Mr. Russo's warehouse in Brooklyn?

A I have.

Q Did you price bananas?

A I have.

Q The same grade and quality you purchased from the same ship?

A Right.

Q What was the outcome of the pricing of those bananas?

A He could sell them to me cheaper than I could buy them.

Q From Standard Fruit & Steamship Company?

A That's right.

Q Was that a normal thing, did it occur many times?

A Every time I went down there and wanted to get bananas off him.

MR. BROOKS: Your Honor, I move to strike that answer. It is not responsive to the question whether he knew Mr. Russo obtained rollers. All he knew, Mr. Russo could sell to Mr. Lombino at a lower price than Mr. Lombino can buy.

THE WITNESS: Counsel, if Russo was getting bananas from Standard Fruit, how can he sell them to me cheaper than I'm buying it for? He is not going to lose money to me because I'm good looking.

THE COURT: I don't understand the objection.

MR. BROOKS: The answer was he went to Mr. Russo's place of business and saw that he, Mr. Russo, could sell bananas to him cheaper than Mr. Lombino could buy from Standard Fruit. That tells us nothing about rollers. We haven't even identified that Mr. Russo's fruit came from

Standard as opposed to United or --

MR. SGARLATO: Your Honor, he has testified it was the same grade and quality from Standard Fruit & Steamship Company.

THE COURT: Is that your testimony?

THE WITNESS: That's right.

MR. SGARLATO: I submit in response to Mr. Brooks' objection, that although what he says does have merit, this is not direct evidence. We weren't there when Mr. Russo purchased these bananas as rollers but at least it is circumstantial evidence that should be admitted, your Honor.

THE COURT: All right, proceed.

Q Do you know of any wholesale distributors that received rollers from Standard Fruit & Steamship Company?

A D. Loy up in the Bronx, American Banana up in the Bronx.

Q Did you ever make any complaint to Mr. Sprocco about this procedure?

MR. BROOKS: Your Honor, I am going to move to strike that testimony unless we lay the foundation for Mr. Lombino's knowledge of how those other competitors got rollers from Standard Fruit.

THE COURT: Overruled.

Do you understand the question?

THE WITNESS: Yes, your Honor.

THE COURT: Did you ever lodge a complaint to who?

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MR. SCARLATO: To Mr. Sprocco.

THE WITNESS: I have told him a number of times the banana jobbers up in the Bronx are selling bananas cheaper than we can sell them out on the street and his question was that they're big and they got a big volume and they're able to work a little closer than I am.

THE COURT: What does that mean, work a little closer?

THE WITNESS: On a markup.

THE COURT: You mean on a lesser markup than yours?

THE WITNESS: Right, but they do a tremendous amount. The volume, working on a lesser markup, and they can still come out ahead because they've moving the volume of merchandise with the same amount of overhead and expenses.

MR. SGARLATO: Your Honor, at this time plaintiff offers into evidence the plaintiffs' exhibit which is referred to in the pre-trial order as Plaintiffs' Proposed Exhibit 1, and I would ask that it be marked as Plaintiffs' Exhibit 2 in evidence.

THE COURT: Any objection?

MR. BROOKS: Yes. For what purpose is this being offered?

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THE COURT: And what is it?

MR. SGARLATO: If your Honor would refer to the pre-tri l order, that section --

THE COURT: What page of the pre-trial order?

MR. SGARLATO: It would be the third page, your Honor, Section 3, subdivision 3: "During the period March 29, 1968, to March 28, 1972, inclusive, the plaintiffs purchased bananas from the defendant as indicated" -- I'm sorry, your Honor, that's the wrong one. It would be subdivision i, of the same section on the next page, and subdivision h, the preceding paragraph:

"Defendant sold bananas to various New York City wholesalers including plaintiffs at various prices during the period March 29, 1968, to March 28, 1972.

i. Plaintiffs Proposed Exhibit 1 as amended is an accurate summary of certain sales to plaintiffs by defendants."

The defendant has stipulated, in the pre-trial order, that bananas were sold at varying prices. The defendant has further stipulated that this exhibit, which has been amended by me along with counsel for the defendant, and as it appears here today, is an exhibit which both sides agree is accurate.

I would offer it into evidence as a summary of

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the defendant's records which I personally have examined and made a summary of sales to Mr. Lombino's company, and the other two plaintiffs, showing the exact discrimination in this case, your Honor.

I have taken the summary --

THE COURT: That includes sales to the plaintiffs and others?

MR. SGARLATO: It includes sales to the plaintiff and other distributors in the New York City area.

THE COURT: What is your objection, Mr. Brooks?

MR. BROOKS: Your Honor, if you go further in the pre-trial order to the section entitled "Exhibits", you will see that we reserve the right to object when we learn the purpose of the offer. If the purpose of the offer is to compare the prices that were given to the plaintiffs and the prices that were given to other customers purchasing bananas from the same vessel, we do object because the exhibit is selective. It doesn't show all of the other purchasers from the same vessel. It doesn't show all of the shipments plaintiffs purchased from. As far as the data which it does show, it is accurate, but in a price discrimination case, your Honor, I think it is prejudicial to take the whole and then circumscribe it as it suits your case.

If you take a look at the first page of the

exhibit, there are additional customers who purchased from that vessel besides those that are disclosed there by Mr. Sgarlato's exhibit. Those that are disclosed are accurately disclosed, but there are many more that we have a chart which includes Mr. Sgarlato's data but also includes the entire universe.

THE COURT: Is that so, Mr. Sgarlato?

MR. SGARLATO: What the defendant has done, your Honor, is made a compilation of all the trannsactions in which the plaintiff was involved with Standard Fruit & Steamship Company, and I have gone over this list as per a request to admit, and I have admitted these are all of the transactions.

Now, the plaintiffs' exhibits are the ones that we claim are discriminatory.

THE COURT: We will admit yours and then the defendant can put his in.

MR. SGARLATO: Thank you, your Honor. That is what my suggestion was going to be. Would the defendant care to see this?

MR. BROOKS: If you represent it is the same one you have shown us.

MR. SGARLATO: Yes, as amended.

THE COURT: Received.

(Plaintiffs' Exhibit 2 received in evidence.)

THE COURT: That covers New York City?

MR. SGARLATO: Yes, your Honor.

At this time, your Honor, I will not ask the witness any questions with regard to this exhibit. I would request that the court look at this exhibit and examine it because this basically is a good portion of the plaintiffs' case. This contains the transactions which we claim are discriminatory.

THE COURT: All right. It has been received. Let's proceed.

BY MR. SGARLATO:

Q Mr. Lombino, did you ever receive any literature from Standard Fruit & Steamship Company with regard to a promotional program which they had?

A I have.

Q Mr. Lombino, I show you a group of letters.

MR. SGARLATO: May we have these marked.

(Plaintiffs' Exhibit 3 marked for identification.)

Q Mr. Lombino, would you tell us what those letters are?

MR. BROOKS: I object to the form of the question.

Q Would you identify those letters for us?

A Yes. These are letters from Standard Fruit &

Steamship Company notifying the jobbers in the metropolitan area that on every third week they would have what they called a bonus sale, that you were able to buy bananas for, I think, it was 50 cents a box less than the market price at the time.

Q Did you receive these letters?

A Yes.

Q Did you participate in this program?

A I did.

Q And you received the discount that they were providing?

A Whenever the bonus week was available, I got my share.

MR. SGARLATO: At this time I would offer those letters into evidence.

THE COURT: Any objection?

MR. BROOKS: I think I'm familiar with those, your Honor. The witness hasn't identified them because they provide particular terms for particular programs. They came out at different times and they changed the nature of the program. I don't think there is a foundation for them coming in. If you'll give me a moment to look at them, I think I will tell you I don't object to them coming in but I will object to the identification the witness has put into the

record about a group of five different brochures containing
b4 five terms.

THE COURT: He said simply that this material received by him from the defendant advising of special deals with relation to bananas. Do we need anything else?

MR. BROOKS: I agree with what you have stated, your Honor, but he also said there was a 50-cent premium payable under certain terms

THE COURT: The document will speak for itself.

MR. BROOKS: No objection.

THE COURT: That will be received.

xx (Plaintiffs' Exhibit 3 received in evidence.)

Q Mr. Lombino, in addition to these letters informing you of this promotional program, did you receive any sort of calendar with regard to that program?

A Yes.

Q Would you explain what that calendar was?

A Standard Fruit & Steamship Company used to mail to each jobber a calendar and it was marked off in color the week that you would get the bonus from the bananas: the early part of the week or the latter part of the week. And, every third week, you knew that you were in for a bonus on those particular bananas on that ship's arrival. They used to send you a chart, and I think it went for about three

months or two months and I used to have that on my pegboard in my office and I knew exactly when the bonus week was available to the jobbers in the City of New York to pick up the bananas at a discount. That's including all jobbers, not just me. Everybody who bought off Standard Fruit. That bonus was for everyone.

Q Mr. Lombino, going back to 1967, let's say January of 1967, can you describe the nature of your business with regard to the number of employees you had, the volume of business you did, the place where you operated from, etc.?

A Well, in 1967 --

THE COURT: Excuse me, at this time we are going to take a ten-minute release.

(Recess)

THE COURT: I think there was a question when we adjourned.

MR. SGARLATO: I recall what the question was, your Honor.

Q Mr. Lombino, going back to the year 1967 and more specifically January of 1967, can you describe the type of operation Lombino & Sons, Inc. had, and more specifically the number of employees, the place of business, and the operation in general?

A In 1967 we were located in the Washington Market. We had our own building with seven large refrigerated banana rooms, one bookkeeper. Two brothers and myself, the three of us, were in the corporation. I had three inside men and I had three drivers. A total of ten employees, including the three bosses and employees.

Q Would you tell us what position you held in 1967?

A I was the buyer, the overseer and the ripener.

Q Did you do any manual labor?

A Very little.

Q When you say very little, will you describe the type of labor you did?

A I used to make sure that the men took the right merchandise out of the rooms, saw that the trucks

got loaded right, and if one of them had to take a couple of minute break I would pitch in and help get the trucks loaded.

THE COURT: How many trucks did you say you had?

THE WITNESS: I had four trucks, your Honor.

THE COURT: And how many men?

THE WITNESS: I had the three driver, three inside men, two brothers and myself, and a bookkeeper.

Q In the year 1967 did you drive a truck?

A The only time I would drive a truck would be on vacation schedule when the drivers got their two or three weeks vacation, then I would pinch hit because I know all the runs.

Q Did you carry bananas?

A Just on vacation schedules.

Q But normally you wouldn't carry any boxes of bananas?

A I was more like a supervisor, an overseer.

Q In 1968 will you give us a general description of the business in 1968?

A Well, in 1968 the business started to peter down a little because the competition was so keen outside, the volume fell off a little bit. And then my brother,

my older brother, he just couldn't take the aggravation. It was affecting him, so he pulled out of the business.

Q How many trucks did you have in 1968, Mr. Lombino?

A I still had three trucks running.

Q Did you have them throughout the entire year of '68?

A Yes, they were my own so I had to keep them. But they weren't working to full capacity.

Q Did you still have the same place of business?

A Yes, I did.

Q With the same number of employees?

A Yes, outside of my brother, my oldest brother leaving.

Q During 1968, Mr. Lombino, were your duties basically the same as in 1967 or did they differ?

A No, I started to work a little harder.

Q More specifically, what did you start to do in 1968?

A Well, then I laid off an inside man and I had to pitch in and help take up that little slack that that inside man did.

Q Can you be more spycific? What did the inside man do?

A Well, he used to take the boxes out of the rooms, break them up, pack them into 20's, look them over, make large ones, makp small ones out of them.

THE COURT: Make large ones of what, boxes?

THE WITNESS: Yes, your Honor. 40 pounds come to a box and in that 40 pounds you got small, medium and large bananas.

THE COURT: So he would break up those boxes, is that what you're saying?

THE WITNESS: That's right. I have hospitals that want a medium size banana for their patients, so you have to give the hospital all the, try to get them as close to one size as possible.

THE COURT: I just didn't understand what you meant.

Q You would repack the bananas?

A Right.

Q In 1969, Mr. Lombino, were you still located in Washington Market?

A No, then the New York City Urban Renewal Area took the market down. They condemned that whole area, demolished it and I moved up to my present place where I am at now.

THE COURT: Where is that?

THE WITNESS: That is in the 38 Little West 12th Street, right in the heart of the meat market.

Q When did you move to this new location?

A 1969.

Q Can you tell me how big the location was in 1969, how many rooms you had?

A At the new location or at the old location?

Q New location?

A I have five rooms there.

Q Did you when you moved into this location, were these five rooms refrigerated and ready for you to occupy?

A No. I had to build them.

Q Can you tell me who built them? Did you, or did you hire somebody to build them?

A Yes, I had a refrigeration man do all the refrigeration for me. I had an electrician do all the electrical work for me, and a carpenter do all the carpentry work. And then a lot of it we did ourselves.

Q During the year 1969 how many trucks did you have during that year?

A The same three, but they weren't working to capacity.

Q How much of capacity were they working?

A About 75 per cent.

Q Did you have the same number of employees?

A Outside of the two that were let go. One that was let go and my brother that just packed it in because he couldn't take the gaff.

Q In 1969 were you using the five refrigerated rooms?

A Not to capacity.

Q Can you give us an estimate of --

A Capacity on my present plants is about 2200 boxes capacity. I was using 17, 1600 boxes.

Q Back in 1967 when you had seven rooms what was the capacity of those rooms?

A Almost 4000.

Q Were you using them to capacity?

A Almost every week except in the summertime when the business would slow up a little. But 10 months of the year they worked capacity.

Q In 1969 were your duties the same basically as they were in 1968?

A No. I was working a little harder.

Q You were working harder still than you were in '68?

A Naturally. I was two men less.

Q During 1970 the business was still located on

Little West 12th Street?

A Right.

Q How many trucks did you have in 1970?

A Two.

Q Did you still have the same amount of employees as in 1969?

A No. I let a driver go.

Q What was the total number of boxes you were handling weekly on the average in 1970?

A Oh, I was down to about 900.

Q Your duties, Mr. Lombino, will you describe them in 1970?

A Then I was just like a hired hand. I was a working boss.

Q You used to carry bananas?

A Absolutely.

Q Drive a truck?

A That's right.

Q How many employees did you have in 1970?

A In 1970 I had two drivers, a bookkeeper, one inside man and my brother and I.

Q In 1971, Mr. Lombino, can you describe the business in 1971?

A Yes. In '71 I remember it well because that

is when my brother packed it in. He used to take care of the route in Brooklyn and the competition was so keen there and so much aggravation that we just gave the complete run up.

Q Was there any of your competitors in particular that were hurting your business?

A Frank Russo was the one that did the most damage to me.

Q In Brooklyn?

A In Brooklyn. That is why I gave that Brooklyn run up. I couldn't compete with him.

Q What about in other parts of the city?

A And then you had Long Island City, there was the same thing. You go in for four dollars, someone comes in for three and a half, the same kind where you were trying to sell for four. You went in for three and a half, he came in for three. Always a 50, 75-cent spread.

Q What about Mr. Deloy?

A He had the Bronx and midtown Manhattan and upper Manhattan.

Q Was he one of your competitors?

A Yes, sir.

Q Was Mr. Deloy to your knowledge selling below the price you were charging?

A Indirectly. He was selling to a jobber who in turn was selling to my stores cheaper than I could sell it.

Q Who was this jobber, do you know?

A That jobber was a buyer of the Pioneer Fruit Stores. It is a chain of supermarkets in Manhattan.

Q Getting back to the year 1970 you were now down to how many trucks, did you say?

A Two.

Q Let's go to 1972. In 1972 how many trucks did you have then?

A One.

Q How many employees did you have?

A I had one inside man, one driver and myself.

Q How many boxes were you handling a week, approximately, in 1972?

A Between six and seven hundred.

Q During this period of '67 through 1972 -- let's go back to 1966 through 1972; were you dealing with Standard Fruit & Steamship Company during that time?

A 75 per cent of my sales were with them.

THE COURT: '66 to --

MR. SGARLATO: '66, your Honor, through '72.

Q Now in 1972, Mr. Lombino, did your duties again

increase?

A Sure. More responsibility on me, more work on me because I had less help and to keep the plant in operation to cover the overhead I just had to work that much harder.

Where I had a bookkeeper do all my books, I did thee books. I became the bookkeeper. I became the packer, I became the driver, I became the inside man, the ripener, the buyer, everything.

Q Did there come a time, Mr. Lombino, when you had one truck and you drove that truck yourself?

A That's right.

Q When did that occur?

A That was the latter part of '72.

Q How many employees do you have now?

A None. I do it all myself.

Q You do everything yourself, you pack the truck, you drive the truck, you unload it?

A Everything myself.

Q When did that come about? When did you start doing everything yourself?

A The tail end of '72. Around September or October of '72 the expenses, the overhead was more than I could absorb and the only way I was able to do that was to

get on the truck myself and do the books myself on the weekends, and the volume fell down. But the expenses didn't get any cheaper. The rent still stayed the same and everything, you know.

Q Mr. Lombino, let me show you some income tax returns. I will have these marked as Plaintiffs' Exhibit 4 for identification.

(Plaintiffs' Exhibit 4 was marked for identification.)

xx Q Mr. Lombino, I don't want you to read from them, I want you to look at them. Do they refresh your recollection as to the gross income which you received in 19 -- the top one is 1966?

A Right.

MR. BROOKS: Your Honor, I object to the question. He hasn't asked Mr. Lombino whether he could recall that without refreshing his recollection.

THE COURT: Yes. First ask him if he can recall it. If he can't, then he can refresh his recollection.

THE WITNESS: I don't have to look at the income tax returns. I know the volume of business I was doing in 1966 according to what I am doing now. It's not even one-quarter of what I did.

THE COURT: What years do these cover?

MR. SGARLATO: '66 to '72, your Honor.

THE COURT: You are asking him now if he recalls what his income was during those years?

MR. SGARLATO: Yes, your Honor, his gross income.

THE COURT: Do you know your gross income for each of those years from '66 to '72?

Q Do you know the figures, Mr. Lombino?

A Well, not to the dollar and cents.

THE COURT: Do you need to look at it to refresh your recollection?

THE WITNESS: I could look at it to refresh it. It's quite a few years back.

THE COURT: All right. Look at it to refresh your recollection.

Q These are your income tax records, Mr. Lombino, copies of your income tax returns?

A They are.

Q Federal, is that right?

A Yes.

Q Looking at 1966 on line 1 on the first page, Mr. Lombino, can you tell me what your gross income was for that year?

A $256,167.96.

Q Can you tell me what your gross profit was, on line 3?

A $70,765.12.

Q Let's look at your income tax return for 1967.

THE COURT: These documents speak for themselves.

MR. SGARLATO: They are not in evidence, your Honor. I am just using them to refresh his recollection.

THE COURT: You can put them in evidence. Let's not take time with things that speak for themselves.

Do you want to offer them?

MR. SGARLATO: Yes, your Honor.

THE COURT: Any objection?

MR. BROOKS: No objection.

(Plaintiffs' Exhibit 4 was received in evidence.)

xx Q Mr. Lombino, throguhout the period '68 through '72 did you lose any customers?

A Quite a few.

Q At my request did you compile a list of customers which you lost?

A I did.

Q Starting in 1968. I am going to show you

this list, Mr. Lombino, after I have it marked as Plaintiffs' Exhibit 5 for identification.

(Plaintiffs' Exhibit 5 was marked for identification.)

xx Q Is that an accurate list of the customers that you lost from 1968 through 1972?

A To the best of my recollection it is, sir.

Q Have you recalled all the customers that you lost, in that list?

A Yes, I do.

Q Is that a total list of the customers you lost, or just the ones you recall?

A It's about 90 per cent.

MR. SGARLATO: Your Honor, at this time I would offer that into evidence.

THE COURT: Any objection?

MR. BROOKS: Simply to show that the customers left Mr. Lombino, is that the purpose of this offer?

MR. SGARLATO: Yes, at this time.

MR. BROOKS: May I look at it?

MR. SGARLATO: Surely.

(Pause.)

MR. BROOKS: I have no objection to this coming in to show lost customers.

(Plaintiffs' Exhibit 5 was received in evidence.)

xx Q Mr. Lombino, do you recall the manner in which you lost those customers, whether or not you lost them to a competitor or the store went out of business, or how you lost them?

A Lost them most through competition, Counselor.

Q Do you know which of your competitors you lost these customers to?

A Yes. The majority of the customers that I lost in Brooklyn was lost to Frank Russo. That is why my youngest brother quit because he used to be out on that run and every time he'd go into one of these stores and try to sell bananas he was always being undersold by 50 to 75 cents, the same bananas that he was trying to sell the customer.

Q Did you lose customers to any other competitors? You can look at that list.

A Yes. I don't even have to look at the list. It's on the top of my head. I lost a few to Esposito, I lost a few to -- what's his name -- plantains from Attorney Street --

Q You can look at the list to refresh your recollection if it is on there, Mr. Lombino.

A The majority of them were lost through Russo. Sure. The majority of them was all Russo.

Q By the way, Mr. Lombino, at your present place of business do you have a lease there?

A Do I have a lease?

Q Yes.

A Yes.

Q When did you sign that lease?

A That lease was signed nine years ago.

Q What was the terms of the lease?

A For nine years.

Q How long did it run?

A For nine years.

Q You mean it's going to expire soon?

A It will be expiring soon.

Q How many of those rooms do you use at the present time?

A Now I only use three.

Q Out of the five?

A Right.

Q For how long have you been using three of those five rooms?

A For the last three years.

Q Has your rent decreased?

A My rent has increased.

Q Has increased?

A Well, it was stipulated in the lease, the first five years is a certain amount and then the next five at an additional increase.

Q Give us the figures, if you recall them, Mr. Lombino?

A My rent has increased twenty-five dollars more a month.

T6

Q What was the original rent?

A 125.

Q And now it is?

A 150.

Q Mr. Lombino, during the period from 1971 up to the present, when you became aware that your competitors were under-selling you, were you able to reduce your markup in order to compete with these other competitors?

A You couldn't reduce your markup because you were working close enough as it was then. How can you reduce your markup when a fellow's got you beat by a half a dollar, 75 cents before you even start? There is certain expenses that go on whether you make a markup or not. Those are steady, fixed expenses: gas, electric, heat, rent, paper. Those are all steady, fixed income, whether you sell one box of bananas or you sell a thousand.

Q Do you still deal with Standard Fruit & Steamship Company?

A No, I don't.

Q When did you stop purchasing bananas from them?

A About a little over two years ago. I have occasionally bought a load, maybe two or three loads in the past two years off them.

Q Do you have difficulty obtaining bananas from

hph2 Lombino-direct

Standard Fruit & Steamship Company?

A Well, when I first called up, the first time I called up for a load of bananas a week before the ship came in, they told me they were over-sold already.

THE COURT: When are we talking about now?

THE WITNESS: This was about a year ago, your Honor.

b2

Q Are you familiar with the operation of Frank Russo, his place of business, etc.?

A Well, I got a general idea.

Q Have you been to his place of business?

A Yes.

Q Where is he located?

A On Carroll Street.

Q What borough is that?

A Brooklyn.

Q Do you know Mr. Russo?

A I know him well.

Q When was the last time you spoke to Mr. Russo?

A Two weeks ago.

Q How long have you known him?

A Frank I know about 25 years.

Q Can you describe Frank Russo's operation for us?

A Well, Frank Russo has an operation that his bananas

are reasonable and he can get them at his price, and he can take almost anything the company can send him. He can use five, six, seven thousand boxes of bananas a week.

Q How many refrigerated rooms does he have?

A About six or seven. I'm not sure.

Q Do you know how many trucks he has?

A Now?

Q Yes.

A No, I don't. I don't think he is jobbing any more, going on the outside any more.

Q Let's say from the period of 1968 to 1972. Was he still located at the same place?

A Yes.

Q Do you know how many trucks he had during that period, approximately?

A I would say maybe four, five, six. I know he had a lot of trucks in his back yard but just how many -- he had small ones, big ones. To give you a specific amount, I couldn't say, but I know he had four or five, at least, trucks.

Q In opecation, delivering bananas?

A Yes. He had men going out all over Brooklyn.

Q Did Frank Russo himself drive any of those trucks?

A Not to my recollection. He was always inside.

He was the boss.

Q Do you know whether or not Frank Russo owned the building in which this business is located?

A I think he owns that building.

MR. BROOKS: I move to strike the answer as not responsive, based on an assumption.

THE COURT: Don't ask him questions he doesn't know of his own knowledge.

Q Do you know if he owns it, or don't you?

A Yes, he is the owner of that building.

Q You know that as a fact?

A That's what he said. He owns it. I take his word for it.

THE COURT: That's hearsay, Mr. Sgarlato.

THE WITNESS: The man said he put a lot of money into the building, so it must be his.

THE COURT: That is stricken as hearsay.

Q Do you know approximately how many employees Mr. Russo has in his business?

A No, I don't.

MR. BROOKS: Your Honor, I am going to object to this line of questioning as irrelevant. I don't see how it affects the issues in this case.

THE COURT: I don't either.

MR. SGARLATO: Your Honor, I am trying to show the overhead of Mr. Russo.

THE COURT: I don't know how you can show it through this man. He is not in that business.

MR. BROOKS: You can ask him how many employees he has today, what he pays them, what work they do for that money.

Q Mr. Lombino, I am going to ask you to look at Plaintiffs' Exhibit 2. Open it up, Mr. Lombino and I want you to leaf through those pages.

THE COURT: Is there a question to the witness?

MR. SGARLATO: Yes, your Honor. I want him to look at this and ask him a question based on what he sees.

Q Mr. Lombino, in comparing the prices which you had charged, as compared to your competitors in that table, did you ever compare bananas of different quality?

MR. BROOKS: I object to the question. If he is asking what the document shows, the document speaks for itself.

THE COURT: I would think so.

MR. SGARLATO: Your Honor, there is an issue in this case --

THE COURT: I thought you said that is the plaintiffs' case in this exhibit, isn't that so, that shows the difference in price to the plaintiff as opposed to some

other customer with respect to the same quality and quantity of bananas. Isn't that what you said?

MR. SGARLATO: Yes, your Honor.

THE COURT: Why do you have to ask him that?

MR. SGARLATO: Because, your Honor, this table was compiled from the defendant's IBM runs, defendant's invoices and I have compared bananas of the same quality as described in the defendant's records. For example, all those different types of bananas we went over before. The defendant is raising, or I anticipate a defense that the defendant will state that although our records state these are Ecuador boxes, there are different categories within that category of Ecuador boxes and therefore it's a different grade and quality.

b3

I don't know if your Honor follows me.

THE COURT: No, I don't follow you.

You asked this witness to look at the document and tell us whether he ever compared what? What was the question to the witness?

MR. SGARLATO: My question was: "Did you ever compare bananas of different grades and quality in this exhibit" or do any of the sales refer to a comparison of different grades of bananas.

THE COURT The objection is that the document speaks

for itself. You don't have to ask the witness to tell us what it says becausewe can look at it and see what it says.

MR. SGARLATO: I understand, your Honor, but if we look at what it says -- if your Honor would look at it, I think your Honor might understand my point better.

What I am saying is, your Honor, if your Honor looks at a page you will see the name of various customers, the price they paid for bananas and the type of banana which they purchased.

Let's say, for example, one page has Ecuador boxes on it. Each customer would have purchased Ecuador boxes in that exhibit, and that exhibit has been taken from the defendant's records.

Now what the defendant says, even though it says Ecuador boxes, there are different grades that are not reflected in those records, that are reflected in other records and, therefore, you are dealing with a different grade and quality of bananas.

That's what I wanted to bring out, your Honor.

THE COURT: You want to bring out from this witness that when it says "Ecuador boxes", it is only one kind?

MR. SGARLATO: Yes, your Honor.

Q Is that correct, Mr. Lombino?

A Yes. That I understand.

Q And all those different categories compared there, are they all the same type of bananas?

A That's exactly right. If it calls for Ecuador boxes, that's what it is. If it is Cabana boxes, it is Cabana boxes.

MR. BROOKS: Your Honor, I move to strike the testimony. There is no foundation laid for this witness to testify to that fact. He doesn't know what was in somebody else's Ecuador boxes. This is something you have to ask defendant.

THE COURT Isn't it the defendant's contention, as suggested by plaintiffs' counsel, there are different types of Ecuador boxes?

MR. BROOKS: The defendants' contention is that the designation on an invoice or IBM run of Ecuador boxes does not contain the specified types or varieties within those Ecuador boxes; it simply shows the box is from Ecuador and testimony will show there are different kinds of bananas and I am using "kind" in a general way and some of those sold for different prices. However, the purpose of generating this kind of record was not to desribe the kinds of bananas in an Ecuador box. Ecuador box simply tells you gross information about bananas but not all the information you want to know.

THE COURT: As I understand the plaintiff's testimony, he knows of his own knowledge that when it says Ecuador boxes it is talkingabout a type of banana and that's it.

THE WITNESS: That's right, your Honor.

MR. BROOKS: I don't think there has been foundation laid for him to have that knowledge.

THE WITNESS: Why not, counselor?

THE COURT: There is a foundation because he has been in the business, according to his testimony, dealing with the defendant for many years.

Proceed.

MR. SGARLATO: Your Honor,before I proceed, I would like to point out to the court one thing. The defendant has stipulated that in his own record, his own IBM runs and invoices, he refers to Ecuador bananas in various ways. Some of these ways are Ecuador Dole, Ecuador boxes--

THE COURT: We went over that. And, we have a stipulation.

MR. SGARLATO: And now what he is saying is although we referred to them in all these different ways, under this one category of Ecuador boxes, there are other types of bananas included.

THE COURT: I understand.

MR. SGARLATO: Thank you, your Honor. No further questions.

THE COURT: We will recess until 2 o'clock.

(Recess to 2 P.M.)

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AFTERNOON SESSION

(2.10 p.m.)

M I C H A E L L O M B I N O , resumed.

CROSS EXAMINATION

BY MR. BOOKS:

Q During 1968 through 1972 did you sell any other products other than bananas?

A That's all. Just bananas.

Q I think you testified that during this period you bought about 75 per cent of your bananas from Standard Fruit; is that correct?

A That's right.

Q Do you recall telling me at your deposition that you bought 98 to 99 per cent of your bananas from Standard Fruit during that period?

A I don't recall.

Q Let me try to refresh your recollection in that.

At page 7 of your deposition I asked you the question:

"During those four years what percentage of your bananas would have been purchased from Standard?"

and your answer was:

"I would say about 98, 99 per cent."

Does that refresh your recollection?

A Probably did.

Q You probably said that?

A Yes.

Q What do you believe to be the case today?

A Today, I don't buy nothing from Standard at all.

Q No, I mean what do you believe to be the true state of affairs back in '68 through '72?

A Probably 75, 85 per cent. I bought a few loads from other companies but -- 75 to 85 per cent of my business was Standard.

Q Have you done anything to refresh your recollection on that question since I took your deposition on March 14, 1973?

A No, I didn't do anything.

Q But it is your recollection today that 75 to 85 per cent?

A That's right.

Q Who did you buy the other bananas from?

A Occasionally I would buy off West Indies or United Fruit or Pan American or -- what was the name of this other outfit -- R. Dixon & Company.

Q Were those companies competitors of Standard

Fruit during this period?

A Yes, they brought in bananas the same way that Standard Fruit did.

Q How would you decide when you would buy from one of those companies as opposed to buying from Standard?

A Well, I would buy off them when I couldn't get my full allotment off Standard.

Q What do you mean by full allotment?

A What I needed for the week. If I needed a thousand boxes for the week and all Standard could give me was 700, I'd have to fill the other 300 with the other individual importers.

Q Which was the biggest importer at that time, of the companies you named?

A Well, Standard and United were running neck and neck.

Q How about the others?

A They were small compared to United and Standard.

Q Did you keep track of the price of bananas in the market as a whole, in other words, keep track of the United price and the Standard price so that you were informed on the market price?

A Oh, I knew what all the companies were getting for their bananas.

Q How did you determine that?

A You call up the broker who was in charge of the distribution of the bananas for the certain companies. You'd call up Standard, and Roger would get on the phone and say, Mike, we are doing 320 for bananas this week. You call up United and you speak to Frank Morro and he says, we are doing 320 this week.

Then you get the general trend of what the price of the market was for that week.

Q Suppose United said, we are 310 and Standard said, we are 320? Where would you have purchased?

A Very seldom, it never happened like that. They always were the same price. Don't ask me how they got together like that, but they always managed to have the same price quoting for the week.

Q Was that the case with the other companies from which you bought?

A No, the other companies you could have gotten a little cheaper but they weren't on a weekly arrival but you could depend on their allocation week in and week out. They were more like a hit and a miss. They'd come in maybe once in ten days, sometimes they'd miss a whole week and wouldn't come in for two weeks. You couldn't run a business on a situation like that. Their arrival wasn't

as steady as Standard and United.

Q If you could get a better price from one of these other companies, would you take it or would you stick with Standard?

A I most of the time stood with Standard because I got my best allocation from them.

Q You mean they would make room for you in the supply if the supply was tight?

A No, I placed my order and nine times out of ten they fill it.

Q When would you place your order?

A The previous week. Like I would place my order Thursday or Friday of this week for next week.

Q What time would the vessel arrive in the next week? Did it follow any pattern? Would it arrive on Monday or Thursday --

A Monday or Tuesday, Thursday or Friday, Wednesday or Thursday -- there was never a set date.

Q You always called the week before?

A Oh definitely.

Q When you called did you simply say, I need 700 boxes, or did you say, how much are you selling bananas for?

A That's right. You inquire what they are

asking for them.

Q And when you were told would you place an order?

A I would.

Q Did you ever not place an order after hearing what the price was?

A No. I always placed an order and I always placed it with the understanding that if the market would get weaker, that I would be protected on the price.

Q Are you familiar with the term seaboard price?

A Yes.

Q Can you tell the Judge what that is?

A Seaboard price is what the company is charging for bananas discharged at the port of embarkation of the ship.

Q When is that price quoted? Is that price quoted when you call the week before?

A Right.

Q Could you tell us about the kinds of customers that you had, just some examples of your better customers?

A Every customer is a good customer, Counselor.

Q Did you ever sell bananas to the Waldorf Astoria Hotel?

A I do. I did. I still do.

Q Longchamps Restaurants?

A No.

Q Never did?

A I did at one time.

Q Did you in '68 through '72?

A I don't recollect if it was '68 or '69, but they went bankrupt and they stuck me some money, so I gave them up.

Q How about the Statler Hilton Hotel?

A I have them for an account.

Q The Commodore Hotel?

A I had them for an account until they folded up and stuck me money.

Q I'd like to keep our questions to the '68 through '72 period, so if you will respond to the facts in that period; you needn't tell me what's going on today?

A Okay, sir.

Q You did have these customers in that period, did you not?

A That's right.

Q How about Schrafft's Restaurants?

A I had them also.

Q Horn & Hardart Restaurants?

A I had them also.

Q Daitch-Shopwell?

A I had them.

Q Schiller Fancy Delicatessens?

A Smilers.

Q Smilers Fancy Delicatessens?

A I had them.

Q Would you call those customers quality customers in that they demanded a quality product?

A A quality prod t?

Q Yes, the best?

A No. The main thing about those accounts was the service that they got. Service is my business, Counselor. I get up early in the morning and I make sure I have all those stores delivered by seven o'clock in the morning that they have it ready for their trade.

T2 pm

Q What did these customers do with the bananas you sold, do you know?

A Which customers?

Q The ones we have just listed.

A They used to use them for corn flakes and bananas, jello.

Q Did they ever use them for display?

A No.

Q Did you ever go to the Waldorf-Astoria and see your bananas up on the front table?

A No, I never have and I've been there a number of times with occasions.

Q Did you ever see your bananas in a fruit bowl at the Waldorf-Astoria Hotel?

A No.

Q Let me try to refresh your recollection.

A Maybe I did when we went to an affair there.

Q Think real hard about it. Do you recall ever seeing them there, your bananas?

A Maybe I did.

Q You did?

A Maybe. When I make the delivery into the store, they have all the fruit bowls already prepared to send to the rooms or the breakfast tables or the dining rooms or

anything. They have oranges, apples, grapefruits, bananas. They get the bananas from me so they must be the ones I delivered to them.

Q Do you ever recall seeing them on display, the fruit bowl?

MR. SGARLATO: I don't understand. I don't understand the relevancy.

THE COURT: What are we getting at now?

MR. BROOKS: I am trying to develop Mr. Lombino had a high class clientele that demanded he had a sign, aesthetically pleasing banana and Mr. Lombino was aksed by his customers for that banana and in turn asked Standard Fruit and other suppliers for the best quality bananas.

MR. SGARLATO: Your Honor, Your Honor, I suggest Mr. Brooks should show that by showing the types of bananas that were being sold to Mr. Lombino by his client. We have shown our records based on their records, based on the types of bananas we purchased. The exhibits speak for themselves and were stipulated they are correct.

THE COURT: You want the witness to tell us whether he has ever seen his bananas on display in the Waldorf?

MR. BROOKS: Yes.

THE COURT: Have you?

THE WITNESS: I probably have.

Q When you placed your orders with Mr. Sprocco, didn't you always ask for the best quality bananas?

A I never asked for the best quality. I asked for an Ecuador because, as I said before, it has a better shelf life than the Costa Rica and Honduras. When they load that ship, that's loaded with a load of Ecuador bananas. There is no variation they put extra fancy in one hatch, fair in another hatch and poor in another hathc.

Have you ever been down in the Standard Fruit pier and watch a cargo being discharged, sir?

Q Let me try to refresh your recollection. I asked you the question, on page 38:

"Q So far as you can recall, the only kind of banana that you asked Mr. Sprocco for were top quality Ecuador?

"A Right."

Does that refresh your recollection?

A That's right. I just got through saying that to you, sir. When I say top quality, a lot of times when you get a load of bananas out of the pier, you get a lot of color in it and the colored bananas are supposed to be rejected out. That is not a number 1 load of bananas. You're paying for a number 1 load and you get rejects, which is a dollar or a dollar and a half cheaper. A lot of times you get 40 or 50 of them in a load that you pay top price for

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which weren't top bananas. That's what I'm referring to when I used to tell Roger, "Make sure I get a load of bananas, no rejects mixed in with the load." As far as the cargo coming out, they have four hatches working and whichever hatch your truck is backed into, you get loaded and that's it. There is no distinction or picking out special hatches.

Q Are you familiar with the banana called the Bolivar banana?

A Yes, I am.

Q Can you tell us what that is?

A It comes from a certain section of Ecuador.

Q The Bolivar region?

A Right.

Q That is a recognized kind of banana in the trade, is it not?

A You got bananas coming out of Bolivar, Guayaquil, and other parts of the section. There is four, five different sections that Ecuador bananas comes out of.

Q Do you attribute any particular characteristics to a Bolivar Ecuador banana as opposed to a Guayquil Ecuador banana?

A In my deposition I had with you, I have told you I seen Ecuador Bolivar better than Guayaquil and Guayaquil

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better than Bolivar. It's a 50-50 toss up. Sometimes they're better, sometimes they're not. I never requested a straight load that all I want was Bolivar bananas.

Q How about susceptibility to stem rot? Does the Ecuador Bolivar have any particular resistance to stem rot?

A About the same as the rest.

Q You never requested either one or the other when you bought from Standard?

A No, sir. I just want a good load of bananas with no rejects in them.

Q How about Imperials? Would you ever ask for Imperial Ecuador bananas?

A Yes.

Q Specifically those?

A Yes.

Q How often would you call Mr. Sprocco when you were ordering from Standard, during '68 thrugh '72?

A Once, twice a week.

Q What would be your normal order for the week?

A It's all according what time of the year it was. 700, a thousand, 1,300, 1,800, 1,500. It varied.

Q What would you do with those bananas once they were delivered?

A I would put them in my ripening room and ripen them.

Q How long would they be there before you would send them to your customers?

A Anywhere from five to eight days.

Q What conditions were applied to the bananas in the ripening room? What would you do to them? Just let them sit?

A You process them.

Q What does that mean?

A You put them in the room, give them a little heat to get them to 64, 66 degrees, let them stay like that for 24 hours, give them a bottle of ethylene, air them out, bring them up, drop the temperature down the next day as the color comes into them.

Q What color are they when you buy them?

b2 A Grass green they're supposed to be.

Q If they are not?

A It's a number 2 banana, a reject. I wouldn't call it number 2, but you wouldn't pay a number 1 price for it.

Q That's because you want a green banana so that when it gets to your customer, it's going to be just right, the right color?

A No. The reason why you want all green, when you put that load of green bananas in a room, and they're all green, they'll come up the same color. If you put a load in

that's not green, riped and turning, mixed with it, three, four, fivedays from now, the ones that are ripe are rotten, the ones that are turning are over-ripe. It's a trade, mister -- I forget your name.

Q Mr. Brooks.

A Brooks. There is 40 years' experience behind this here talking.

Q If you got a banana that's more ripe than you considered proper, would you make a complaint?

A A lot of times I'd called up Roger and told him I got a lot of color in my load. He is standing right there to verify it.

Q What would the response be?

A "That happens, we'll give you a little credit, we'll give you a couple of boxes off," something like that.

Q What do you mean "a little credit"? Reduction in price?

A No, five boxes of credit off the bill. In other words, instead of getting, say, 300 number 1's, you got 295 number 1's.

Q You really got 300?

A Right, but 5 of them were rejects.

Q But you are going to pay as if you got 295?

A Right, and you pay 5 for the reject price or

maybe saved a dime or nickel off the price being it was color.

Q The invoice that you got would still be an invoice for the 300 boxes, right?

A A couple of times when I've gotten 300, the invoice was billed to me at 295 because 5 of them were so bad they had to be dumped.

Q Usually, wouldn't you get the invoice billed at 300, and you would remit it to the 295 amount?

A No.

Q Not usually?

A No. You pay, whatever the bill comes in. Once the bill was sent from the main office, you didn't change it unless you got permission, you called up Roger and got permission and he would say all right, take five boxes off the bill or something like that.

Q Didn't Standard Fruit have a procedure to process these quality claims?

A They did.

Q What was that procedure?

A You had to write a letter to the office where you got the bananas from and they would come down and if they found that it wasn't up to specification that they sold it at, they would give you a rebate.

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Q Credit?

A Credit, right.

Q By then you had gotten your invoice, hadn't you?

A That's right.

Q When did you stop dealing with Standard?

A About two years ago, two and a half years ago.

Q Why?

A Why?

Q Yes.

A I stopped dealing with Standard because I would call up Standard and get a price of bananas and I would find out my competitors would always buy them for 20, 30, 40 cents less than I did.

Q And didn't you tell me in your deposition you stopped dealing with them because you got sick and couldn't work for four months?

A That's right.

Q When you came back from work, you didn't deal with them any more because they didn't put plastic bags on the bananas like --

A That was one of the reasons also.

Q One of the reasons. There are more you didn't tell me about at the deposition?

A You got it right there.

Q I don't see anything else in that answer. There are more reasons that you can think of now?

A Isn't there any that the price was higher?

Q Not here.

Is that one of the reasons?

A That was another reason, another one of the reasons why I stopped buying.

Q When did you first decide that their price was higher?

A I knew it all along. I called Roger a lot of times and I said "Guys are getting bananas cheaper than I'm paying" and he said "It can't be, it can't be."

Q You knew this since the beginning or pretty soon after the beginning?

A That's right.

Q Did you know it before 1968?

A On occasions I found out from the trade they bought them cheaper than I did.

Q Why didn't you switch your business to one of the other, three or four competing companies?

A Why?

Q You don't strike me as the kind of guy that would take bad treatment for very long. Why didn't you go to United or West Indies if you knew from the very beginning

that Standard was giving you a bad deal?

A Their arrivals weren't as accurate as Standard was.

Q United Fruit's arrivals weren't as accurate as Standard's?

A United Fruit had very little Ecuador and I told you before that I prefer the Ecuador banana better than the Costa Rica or Honduras.

Q You were willing to pay a little more for the Ecuador?

A Whatever the price was supposed to be.

Q How about West Indies, did they have Ecuador?

A They had it for a while.

Q How about Pan American, did they have it?

A Yes.

Q Why didn't you go take your trade to them, if you were getting poor treatment from the very beginning?

A I didn't buy much from them in the beginning. I never did have vwry much dealings with them.

Q The question is, why didn't you if you didn't you if you didn't think you were getting a straight deal or a good deal from Standard?

A I did't like the branch manager who was running for Pan American, so I didn't buy off them.

Q Personality problem?

A That's right.

Q How about West Indies?

A West Indies was all right, but he didn't have Ecuadors too long. While he had Ecuadors I used to buy off him, but he wasn't a weekly arrival either. He'd come in once in ten days.

Q Did you hear the term clipping a bill?

A I have heard it.

Q What does it mean?

A Clipping a bill?

Q Yes.

A Not paying the full amount of the bill.

Q Getting a bill for 300 boxes at $2 a box and remitting only say $550, which is $50 less than the invoice amount?

A That's right.

Q Have you ever done that?

A The only time I have ever deducted money off a bill was with authority.

Q Whose authority?

A Mr. Sbrocco's.

Q How would you get that authority?

A I'd call him up and tell him about it.

Q What would you tell him? Give me an example.

A That the bananas come in with a lot of color or a lot of stem rot and what-not, come down and take a look at them. He'd come down my place and see them and he'd tell me, all right, take off 10 cents of 20 cents or however we worked it out.

Q Did you ever get that kind of reduction after calling Mr. Sbrocco and saying hey, you sold me at three dollars and I see my competitor out in the street having gotten the bananas at two-eighty, I think you ought to take 20 cents off my price?

A No, sir.

Q You never got that?

A The only time I got anything taken off my bill was when the merchandise was inferior.

MR. SGARLATO: Your Honor, I am going to object to this line of questioning. I think he has gone into it enough. He hasn't raised it as one of his defenses. He's had opportunity to go into it before. In his answers to interrogatories he doesn't even mention clipping of bills. This is the first time I have heard of it. It hasn't been brought into this case at all except for right now, which is the first time.

THE WITNESS: Counsel, I never clipped a bill anyhow.

Q I thought you told me you did clip a bill with authority?

A That isn't clipping a bill. Authority in one thing and taking money is another thing. You have some banana jobbers that get a bill and they just take a hundred dollars off the bill and send it in and that's it.

Q But there were times with authority that you remitted --

THE COURT: Just a minute. First of all, there is a question to the witness which wasn't answered

and that is whether he ever asked Mr. Sbrocco if he could take off something from the bill because he noticed that a competitor had received bananas for something less.

Do you want an answer to that question?

MR. BROOKS: I thought he did answer it and he said he never did. I believe he said that never occurred.

THE WITNESS: That's correct. Never occurred.

THE COURT: The question is, did you ask him?

THE WITNESS: About a reduction in price, your Honor?

THE COURT: Because your compeetitor got it for less.

THE WITNESS: No, I never asked him that either. I have told him, I said, there is people getting bananas cheaper than what I am paying. He says it can't be.

Q You knew that people would get bananas at a cheaper price if they were willing to take the risk of placing their order at the last minute when the boat was discharging and hoped that the boat would be undersold, didn't you? In a sense by distressed fruit.

A Will you phrase that again, Counselor, please?

Q You knew that people could get a price lower

than the seaboard price if they were willing to wait until, say, the day of discharge of the vessel or the day before discharge and place their order at that time, taking the risk that the boat would not be oversold --

A Counsel, I guarantee you anyone who waited at the end of the ship to get a rebate on bananas knew that that ship was long.

Q What does long mean?

A That it wasn't oversold.

Q Right. And that there would be bananas around?

A That's right.

Q As you say in the trade, looking for a home?

A That's right, looking for a home.

Q If bananas are looking for a home --

A And the ones who knew about it was the ones who laid back and didn't take their full complement of order, knowing that at the end of the day Standard Fruit would have 30 or 40 or 50,000 boxes that were looking for a home and could be bought for a whole lot cheaper than with the regular banana jobbers who bought their bananas legitimate week in and week out, without asking questions or looking to find out if they were long or short or tall, was the ones who got burnt. And that is why from where

I was one of the biggest banana men in the City of New York I turned out to be the lowest one.

Q You always placed your order the week before, didn't you?

A That's right, Counselor.

Q You didn't ask questions, did you?

A No, I never asked questions.

Q You didn't wait until the day before the vessel was discharging?

A No, because I had a legitimate business going on and I needed my merchandise week in and week out. I couldn't guess whether the ship was going to be long or short.

Q How about Frank Russo --

A Frank Russo is not a banana man.

Q What is he?

A He is a fellow who if he will get the bananas he will sell them. If he doesn't have them, he doesn't worry about it.

Q Does he sell other fruits besides bananas?

A That's right. He sells tropicals, he sells everything but the kitchen sink.

Q So he can take a chance?

A Sure. When you don't have a steady trade

you can take a chance. But if you have hospitals and institutions that are depending on your delivery every day you can't try and outguess the market.

Q Is it fair to say that there were really three different possible prices, the pre-order price which you would usually buy at the week before or the seaboard price?

A Righr.

Q And then the price before the vessel arrives, but during the week of arrival, and then a price on the day of discharge, assuming that the boat is going to be undersold; isn't it likely that the price is going to be varying downward as the day of discharge arrives?

A Mr. Sbrocco never called me up and said to me, Mike, the market is long, the price isn't going to be the same as I quoted you Thursday or Friday, so figure on a cheaper price. That was never told to me.

Q But didn't you know that? Didn't you know these dynamics in the marketplace?

A I got a pretty general idea of the market.

Q Sure. And when Standard was long United was probably long too, weren't they?

A They probably were.

Q That is what makes people long, too many bananas in the New York market?

A Right.

Q Maybe West Indies is long and United is long and Standard is long at the same time?

A Right.

Q And when that happens the price goes down, doesn't it?

A If it goes down, why don't it go down for everybody, not just a certain few?

Q Some people have placed their order the week before, haven't you?

A Everybody places their order the week before.

Q How do you know that?

A Any legitimate banana man who is in the business isn't going to wait for the day of the ship to find out if he is going to buy bananas or not.

Q Did you ever hear somebody placing an order the week before and then placing another order the day of discharge?

A Certainly. When he's got inside information that that ship is long and he needs 5000 boxes, he is only going to place an order for two.

Q I thought you told me it was general knowledge when these ships were long, that United is long and Standard was long usually at the same time?

A That's right.

Q It was common knowledge in the trade for everybody --

A Everybody had an idea when the market was weak. But how weak it is, they don't know.

Q How would they find out?

A When all the rollers started rolling around nd then your competitors got you beat by half a dollar, 75 cents, then you know how cheap the market went.

Q Did you ever call Mr. Sbrocco on the day of the discharge of a vessel and say, Roger, what's the price today?

A On occasion, I have called hom. Not the day of the discharge of the ship, but the next day when you find out that they had a lot of excess fruit on hand and I would say, does the price still hold, Rog? Yes, as far as the office says, it's still holding.

Q But you knew everybody was long, didn't you?

A No, they don't all get long at one time. Sometimes United Fruit may be long but they will send all their stuff out of town; it doesn't hurt the New York area.

Q How many extra boxes of bananas could you have taken on the day of discharge even if you could have

gotten for half price under the seaboard?

A I could have used half the amount I normally take.

Q Who would you have sold those to?

A I know how to sell them.

Q You do?

A You better believe it.

Q I thought you had a steady trade?

A I had a steady trade.

Q That handled a certain quantity a week?

A That's right.

Q Where would you sell these extra boxes?

A I'd sell a little more each stop.

Q The Waldorf a little more?

A That's right.

Q Schrafft's a little more?

A That's right.

Q It didn't strike me from the way you described your operation that you had much time to go out and recruit new customers; is that right? You stuck with your steady customers?

A There's always room for more customers, Mr. Brooks. How long do you think it takes to go out and see while you are the run, to stop and see a customer?

Q I don't know.

A Very little time.

Q Didn't you tell me in your deposition that you couldn't risk getting stuck with 200 extra boxes in any week?

A Getting stuck with them?

Q Yes. Excess bananas?

A No. All we do is just put the refrigeration on and hold them down a little and keep them cold and order a little less the next week.

Q Let me read some questions and answers from your deposition to you and then ask you if your answer is the same about taking that extra bananas.

"Q Why is that no good for you?

"A How do I know how my business is going to be the next week or the week after? Suppose my account busts up or burns down and he uses 200 boxes a week and I already contracted" --

A Excuse me for interrupting. Will you start that a little further back so I know what you are talking about?

MR. SGARLATO: I was just going to say that. Thank you, Mr. Lombino.

THE WITNESS: Start from the top of the page

so I know what you are trying to bring out.

Q I will start at the bottom of page 54, line 20:

"Q Did you ever place orders for bananas a week or more before the arrival of the vessel?

"A No, sir, never, no.

"Q And I suppose never earlier than that? Even never two weeks or three weeks before the arrival of the vessel?

"A That was one of the main reasons, the last one or two -- the last two or three years that I stopped buying off United Fruit, because they wanted to give them three weeks in advance an order.

"Q Why is that no good for you?

"A How do I know how my business is going to be the next week or the week after? Suppose my account busts up or burns down, and he uses 200 boxes a week and I already contracted and assigned myself to so many boxes three weeks from now? Suppose the guy sticks me and he folds up and goes bankrupt?

"Q Couldn't you keep those bananas in your warehouse?

"A I don't carry perishable stuff. You work

week to week. It isn't like potatoes or onions that you can pile them on top of another and keep them for ten days or two weeks."

A Right.

If your question you're bringing out ordering bananas three weeks in advance. I am talking about extra fruit the day of the ship, of the discharge. Not three weeks from before.

Q But the three-week order placed in advance would result in your getting 200 extra boxes three weeks from the date of that order?

A That's why I would never give a three-week order in advance.

Q And the answer was because you couldn't handle those extra 200 boxes when you got them?

A That was one of the reasons. Suppose I would have dropped dead after I placed the order?

Q If you couldn't handle those extra 200 boxes then how could you have ordered the 200 extra boxes to take advantage of rollers or declining price off the sea-board price?

A Very easily. Put them in and the following week cut down on my regular order.

Q Couldn't you have done that in this case, if

you pre-ordered three weeks --

A No, because if you pre-order you didn't get no cheap price. You got seaboard.

Q Couldn't you get rid of those seaboard bananas --

A Why should I keep stuff an extra week at top price?

Q So you could have gotten rid of cheap bananas but not at regular price?

A No, I would have held th cheap bananas and held down the following week on my allocation that I order.

Q Couldn't you have handled the excess over the advance order in the same way?

A Maybe I could have used some of them, but I wouldn't say all of them. But that is what you got refrigerator rooms today for, to hold the merchandise if you have to. If you got them at 50, 75 cents a box cheaper, you can afford 10 cents worth of refrigeration to keep them and you are still ahead of the game 50 or 75 cents.

Q Mr. Lombino, this morning you identified the various promotional circulars that Standard sent out, which are Plaintiffs' Exhibit 3. Do you recall that to take advantage of these programs, in some cases you had to place an order three weeks in advance?

A I don't recollect. Maybe it's so.

Q That wouldn't surprise you if I told you that?

A Maybe it's so. I wouldn't say yes or no to that because I don't remember.

Q If I told you that one of these circulars required that to participate in the program, would you disagree with me?

A No.

Q You said this morning you did participate in these programs, didn't you?

A That's right.

Q Did you ever pre-order three weeks in advance?

A No, sir.

Q How did you participate in the program, then?

A I ordered so many every week and when the bonus week came on I got my bonus allotment.

Q Without pre-ordering in advance?

A That's right. Roger knew every week I was good for a thousand, 1500 boxes a week. I didn't have to pre-order anything.

Q As a matter of fact, you were really as a practical matter a pre-orderer more in advance than even three weeks because you were a steady customer?

A That's right.

Q Always were there with your order?

A That's right. And that is why I got burnt because I was a good Joe, and guys who I taught in the business are ten times bigger than me today.

Q Would you describe the banana business in terms of supply and demand as a volatile business?

A I wouldn't say it's a volatile business. It's a very perishable business. I mean, you got to know what you are doing, and its's an item that can hold just so long and that's it.

Q Have you ever described it as a very volatile business, in terms of supply and demand?

A Maybe I have.

Q Did you do it at your deposition?

A Maybe I did.

Q You wouldn't disagree with that characterization today, would you?

A Mr. Brooks, whatever you got in that deposition there is things that I told you two, three years ago. Whatever I told you there I'm not denying today.

I don't remember word for word what I said to you, but as long as you got it down in black and white that I said it, I must have said it.

Q We are really concerned, Mr. Lombino, about what the banana business was like in '67 through '72, and

I want you to tell me whether you would agree that it was a very volatile business in terms of supply and demand?

A Well, if that is the word you want to use, you can use volatile business. I have been in it a good while and I know it, and you got to be careful with it, and if you don't know what you are doing you can get hurt, and you watch and you don't overbuy and you get along. If you want to call that volatile --

Q Have you ever heard of any importers of bananas like United or Standard or West Indies having to actually go out and dump fruit, throw away what they couldn't even sell as a roller?

A If a cargo came In with a lot of color, they dump it.

Q I just mean excess cargo in a glutted market? Have you ever heard of an importer having to dump bananas?

A Fresh number one green bananas?

Q Whatever they are when they reach the roller stage?

A Well, I have heard of cases where United sold their rollers just to pay the freight.

Q How about just taking them out to the dump and throwing it away?

A They have done that too when they have colored.

Q How do they get colored?

A Refrigeration on the boat may go.

Q How about sitting around in those trucks waiting around for somebody to buy them as rollers?

A If they hang around long enough they could blow also.

Q Do you know what markup Mr. Russo was getting on the bananas that you noticed him selling to your customers at prices better than you could sell to those same customers?

A I haven't the slightest idea.

Q Did you ever ask him?

A He just said that he is making money and as long as he is making money he will sell. And naturally, if you buy them for 50, 75 cents, as low as a dollar and a half less than your competitor you got to make money, no matter what you sell them at, Mr. Brooks.

Q Did you ever hear of averaging down as a term applied to pricing bananas?

A Yes.

Q Tell us what that means?

A Well, if a jobber needs 5000 boxes of bananas

he buys 2000 at $2, he buys a thousand at $1.75, he buys another thousand at a dollar and a half and he averages down. That is what the expression averaging down is.

Q That means he sells his bananas at a common price which would be the average of those three purchases per box, wouldn't he?

A Absolutely right.

Q If Mr. Russo were to buy some rollers from United and some regular bananas from Standard and average down he would be able to sell Standard bananas to your customers at a price lower than you could, wouldn't he, because he averaged down between United rollers and the Standard regular purchase?

A No.

Q He couldn't do tht?

A No.

Q That wouldn't be averaging down?

A No.

Q Why not?

A Why not?

Q Yes.

A Because when Russo buys bananas they got to be the right price otherwise he don't need them.

Q Is that his trademark, the way he does business?

A That is his trademark.

Q And if he doesn't get bananas one week he gets a lot more onions, right?

A Everything but bananas. These last two or three months when the market has been real high, Russo has had maybe two, three hundred boxes in his place, 500 tops. The market is a little long right now, he is loaded with bananas. That is the trade he's got. He doesn't have any routes any more. He's got all the customers coming to him. He sells all that tropical stuff.

Q You mean he doesn't deliver to the customers like you do?

A Not now he don't.

Q How about in '72?

A Then he did. But the past year, year and a half he gave up all his jobbing business. Now they all come to him.

Q In '68 through '72 did they come to him as well as he delivered to them?

A That's right.

Q I guess if you came to him you got a cheaper price, didn't you?

A Absolutely.

Q Would there be some banana men who would consider the Bolivar Ecuador banana a superior banana to the Guayaquil?

A I don't know.

Q Excuse me?

A I don't know. I'm going by what I know about them. I know banana men who won't even touch Ecuador bananas and only want Honduras and Costa Rica. And I wouldn't touch Honduras and Costa Rica unless I can't get Ecuador. So every banana man has a different viewpoint to what banana he wants to deal.

Q Do you know what causes the banana men to take the kind of viewpoint that they do take?

A No, what?

Q I don't know.

How about the likes and dislikes of their particular customers?

A Mr. Brooks, you are an attorney; I am a banana man.

Q Let's stop right there. Your point is well taken.

I think you testified this morning that whenever you could get them you would order the premium bananas?

A Right, sir.

Q Tell us again what the premium bananas are?

A Standard Fruit came out with a premium package that the banana was of the larger size. They used to put six to eight hands of bananas in a 40-pound box.

Q Does this mean that they were hand selected and they selected the biggest and the fattest?

A They picked the largest ones. Instead of putting 11 or 12 hands in a box like the average run of bananas is, this premium package that they put up would be anywhere from six, seven, eight hands tops to a box of bananas.

Q Why did you prefer to order those when you could?

A Why? Because I like a nice chunky banana and I got the trade for a nice healthy banana.

Q Those cost more, don't they?

A I beg your pardon?

Q Those bananas cost more than the normal bananas?

A Right. And I paid more for them. And yet I found out that Russo had a lot of them bananas that I paid for, cheaper than I paid for them. Figure that out, Mr. Brooks.

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Q Did you charge your customers more when you had Premium bananas?

A No, it just made the work easier.

Q How did it make it easier?

A That I didn't have to go through so many boxes to take everything out, the large to one, the medium to another and the small to another.

Q Do you mean you pack your bananas in your shop?

A That is right.

Q What was your objective in doing that?

A To satisfy my customers.

Q Do you know of any other banana man that did that, repacked bananas in his own shop?

A A lot of them did.

Q Name one.

A A lot of them broke them up. Stricks & Schwartz does that.

Q I don't mean breaking them up. That's a different term than repacking, isn't it?

A You break them up and repack them. You make twenties out of them. How many banana men take the boxes and make 20 out of them? They got a lot of wholesalers that can't use 40 pounders but they have these here small delicatessens that don't even want 20 pounds and they sell

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half a box with their oranges and grapefruits and everything they bring in the store. I got a lot of purveyors that want 20 pounders.

Q Wasn't your repacking designed to segregate them in terms of quality and size and not just to make them up into smaller quantities regardless of quantity and size?

A There is nothing wrong with a small banan. The quality of a small banana is just as good as a medium and large. It's not going to taste different or better.

Q Was your purpose in repacking just to get small quantities out of larger ones or --

A You can get only 40 out of 40. You don't make 45 out of it.

Q Was it your objective to segregate the bananas in terms of quality when you repacked--

A Everything I bought was number 1's.

Q Always the best?

A I always tried to buy the best. Sometimes the best was very poor but it still was the best. Bananas grow. Sometimes they come in a little off but you can't help it, so you manage to do the best you can with what you buy or I should say what comes in from the importers.

Q When you recovered from your illness in 1972, you got back to work in the business, who had plastic bags

on their bananas?

A Delmonte, I think had a few, Pan American had some, and Tropicana.

Q Who did you buy from?

A The one who had the bags.

Q You used the term this morning "sloppy market." Can you tell the court what that means?

A A sloppy market?

Q Yes.

A The market is weak.

Q What do you mean when you say it's weak?

A That the company is asking $4 for bananas but they'll sell them for $3.60.

Q Because there are more bananas in the market than the market can absorb?

A That's right.

Q In the '68 through '72 period, how often would you have a sloppy market?

A I mentioned that before. There is certain times of the year you get the sloppy market. In the dead of the summer, when all the other fresh fruits is out to give the bananas competition, or in the dead of the winter when it's so cold they can't ship too much and they have a backlog of bananas because the weather is so adverse that

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they can't ship it to Canada, upper Maine and whatnot with 10, 12 feet of snow.

Q Do any other things cause sloppy markets? How about simply each company's boat arriving on the same day, United, Pan American?

A That's happening every day right now, Mr. Brooks. b2 They manage to get out.

Q What do you mean get out?

A They sell them.

Q Is that a term that's used?

A For example this week, you had a boat Monday, Tuesday, you got a boat today and tomorrow. That's just this week alone.

Q Tell me what you meant by the term "get out"?

A They sell out. They're sold. If Standard is long this week and they call Canada and say "I can sell you 10 cars, we're doing 4.80 and I'll let you have them for $4," Canada is going to buy them. I don't care about that because they don't hurt the New York area. I wish they would do it all the time, but when they give it to jobbers that work right in the metropolitan area that we're selling the top figure and they're selling someone else from40, 60 to a dollar less, then it hurts.

Q Is that what you meant by getting out, finding

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someone to take excess bananas at lower price?

A No.

Q Did you ever deal with anyone at Standard, with anyone other than Mr. Sprocco during '68 to '72?

A They had another salesman there.

Q Was he the one you usually dealt with?

A Most of the time I dealt with Roger.

Q When you moved your facilities from the Washington Market to West 12th Street, did other banana men who are jobbers get displaced from the Washington Market when it was condemned?

A Yes.

Q Who else?

A Well, Stricks & Schwartz.

Q Anyone else?

A He got out. There was Molletti, he closed up; there was Lucchese, there was Banner, there was me, there was Scollochi. Three or four more little jobbers.

Q There were a number of banana jobbers in the Washington Market, weren't there?

A Yes, we were about 10 or 11.

Q You were the largest, weren't you?

A That's right.

Q Where did most of the others go?

A Well, Stricks & Schwartz went up to the New Hunts Point Market and the rest of them just retired. It is a hard business, Mr. Brooks.

Q I appreciate that fact from your testimony this morning.

Why didn't you go up to the Hunts Point Market rather than cut your facilities in half?

A Why didn't I go to Hunts Point?

Q With Stricks & Schwartz. You were the biggest man in Washington Market.

A Number 1, I didn't want to go all the way up to the Bronx and ride all the way in from where I lived up to the Bronx every day in the week, and the majority of my business was in Brooklyn and midtown Manhattan and by being centrally located right in the heart of midtown, would be a whole lot less expensive to operate my business.

Q When you got your invoices similar to those that Mr. Sgarlatao showed you this morning, did they show the time at which you made the order with Standard?

A Did they show the time?

Q Yes, whether you made it on the Friday before or on the day of the discharge of the vessel or in between.

A No.

Q They didn't?

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A No.

Q It just showed the date of discharge of the vessel and the name of the vessel?

A That's right.

Q Those are the competitors of yours who were selling to your customers at lower prices, did you ever find out the day they placed their order to get the bananas that you claim they were selling to the customers at a better price?

A Did I find out when they placed their order?

Q Yes.

A No. I got to worry about my own business. The only time I worry about somebody else's business is when I find out they sell the bananas I got for a half a dollar or 75 cents cheaper than me. Then I want to want to know how they can do it and it's very easily done. If you buy them cheaper, you can sell them cheaper, Mr. Brooks.

Q You can, if you narrow your profit margin too, can't you?

A You can take off 10, 20 cents, but not a dollar when you only work on a dollar, $1.20.

Q This morning you told us that Ecuador boxes only contained the same bananas. Do you know whether Ecuador boxes contained sometimes Bolivar Ecuador or sometimes Guayaquil

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Ecuador?

A It isn't on the box.

Q I didn't ask you that. I asked you whether you knew.

A Well, I think if you look at the fruit close enough, you might be able to distinguish whether it's a Bolivar or it's a Guayquil.

Q And if I am reading you correctly, the answer to my question is yes, sometimes--

A Well, it's not yes. I said you might.

Q My question to you is whether you knew that those Ecuador boxes sometimes contained Bolivar Ecuador and sometimes contain Guayaquil?

A I don't know.

Q Did you ever see the name Bolivar Ecuador on any invoice?

A Not that I can recollect.

Q How about Guayaquil Ecuador?

A No.

Q Did you know that Standard was importing both those kinds of Ecuador bananas?

A I presume so.

Q Do you think there is any likely place that they were importing them other than in those Ecuador boxes?

A That's what they put them in, the Ecuador boxes, they had a special box made that they had them in. Did they?

Q Of those 25 to 15 per cent of the bananas that you purchased from United or West Indies or Pan American, did you purchaser any rollers from those companies?

A No, sir.

Q Did you ask them for any?

A No, sir.

Q Why not?

A Because they never had rollers or extra fruit because they were only very small.

Q United was very small?

A You didn't say United.

Q I believe I did.

A I'm sorry, I misunderstood.

Q Let's --

A I never went for rollers on United because they didn't have the Ecuador rollers that I was looking for.

Q The other companies never had rollers?

A No. The other small companies, they never had rollers.

Q Why was that? Wouldn't a bad market equally affect them as it would any other competing importer in the metropolitan area?

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A Yes.

Q Why wouldn't they have rollers sometimes?

A Why?

Q Yes.

A Because when the market was sloppy right away they reduced the price 10, 20 cents to everybody, not just to certain people, and they got out and everybody got a shake. Not that certain pets got the good rebates and the regular jobbers who were steady, never complained or never did too much complaining just paid the top dollar all the time.

Q Why didn't you take your trade to those companies?

A I just got through telling you, Mr. Brooks, they weren't a regular arrival every week and I couldn't depend on my running my business on a hop, skip and jump.

b3

Q Are you familiar with the kind of banana called Cavendish?

A I am.

Q Is that an Ecuador banana?

A Well, they cross the seed and got a Cavendish Ecuador.

Q Would Cavendish bananas come in those Ecuador boxes?

A Yes.

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Q How about Gros Michel, are you familiar with that?

A Yes.

Q Is that an Ecuador banana?

A No.

Q Where is Gros Michel grown?

A Gros Michel was growing -- that came from -- let me get my bearings. We used to get the Gros Michel on -- I can't think of where it came out of but out of Central American countries.

Q Did you ever see the word "Cavendish" on an invoice from Standard?

A I don't recall.

Q What are Blues, Mr. Lombino?

A Blues are number 2 box.

Q What does that mean?

A Number 2 means all the small fingered bananas, disfigured, odd shapes. They put them in and they call it a blue, but it's a second grade box of bananas.

Q Did Ecuador produce some blues?

A No.

Q No blues at all?

A Everything coming out of Ecuador was always number 1's, supposed to be anyhow.

Q What are ripes?

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A Ripes?

Q Yes.

A Ripes are when a cargo comes up with color and it has ripe bananas.

Q Too far developed to be a top grade banana, is that right?

A Right.

Q Did ripes sometimes appear in Ecuador boxes?

A Sure.

Q And if you got ripes, did you occasionally get an amount taken off the invoice price to reflect for that?

A Once in a while. If you got a half a dozen boxes, you never complained.

Q This morning Mr. Sgarlato asked you the question whether you knew that some of your competitors paid less for the same grade and quality banana than you paid for the same banana, and you answered yes.

On what basis did you determine that the bananas that your competitors were getting and paying less for were the same grade and quality bananas as the bananas you purchased?

A How did I know?

Q Yes.

A Because a couple of times I was short of a few

bananas and went down to Russo and bought bananas and he sold them to me the same bananas that I had been buying off Standard Fruit, he sold to me cheaper than I paid Standard Fruit for and he didn't sell them to me without b4 making a profit on it, because he doesn't love me that much.

Q Is that the only basis for your answering--

A That was one of the bases. And, he used to run around delivering to accounts. I would go in there with an Ecuador box and they wanted $4 and he is in there for $3.25. How can he do it when--

Q This is Mr. Russo again?

A Right.

Q Any other basis for your answering Mr. Sgarlato's question yes in respect to the same grade of quality?

A Yes. D. Loy uptown was giving up bananas 20, 30 cents cheaper to a jobber than I was retailing.

Q Anything else?

A That's all I can think of now.

Q On any of these occasions that you mentioned, did you ever ask Mr. Russo or Mr. Loy when he put his order in for those bananas?

A What was that, Mr. Brooks?

Q On any of those occasions you have just mentioned, did you ever ask Mr. Russo or Mr. Loy when they placed their

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order for the bananas?

A No, I never did. That's none of my business.

Q Did you ever ask whether to sell bananas to you at that price, either Mr. Russo or Mr. Loy had averaged down?

A Mr. Loy never sold me bananas. He sold bananas to accounts that I was selling and I couldn't compete with him.

Q And you didn't ask him when you noticed that whether he was able to do that by averaging down?

A No. If he was able to average down why couldn't I? Why didn't Standard Fruit say to me "Mike, instead of you taking 1,800 pounds of banana, I'll give you 400 at 3, 400 at 2.50 and 400 at 2, so you can average down. Only certain people they told that to, Mr. Brooks? I mean, let's be logic. That's why I got hurt and that's why I'm where I am today.

Q What were the conditions of the rollers that you bought when you bought rollers, or just generally were the conditions of the rollers any better or worse than the condition of the fruit that would be delivered in the normal course on the day of discharge?

A Same thing, Mr. Brooks. Those rollers were loaded in the afternoon at the end of the shift and delivered to

you the next morning. They didn't change in 24 hours, 12 hours. If they were laying around for three, four days, then there is a possibility that there could be a big change in the condition of the fruit.

Q Were the trucks that the rollers were loaded into in 1968 through 1972 refrigerated?

A When they put them in the fruit cars, they were refrigerated or trailers.

Q I am talking about the trucks that were used in metropolitan New York to deliver rollers.

A No, they weren't.

Q If a banana sat in one of those trucks on a day like this for 12 hours or so, it might deteriorate?

A No, it wouldn't deteriorate because, first of all, when those trucks got loaded it would be late in the afternoon at the end of the shift and sold the next morning before the sun beat down and got them hot.

Q Did the ship always discharge late in the afternoon?

A Nine out of ten times unless there was an exceptionally big cargo and it went in the afternoon, then it --

Q Didn't they start loading the ships as soon as they arrived?

A Generally, yes.

Q It took 24 hours to unload them, roughly?

A No, how did it take 24 hours?

Q I don't know. How long did it take?

A You are asking the question.

Q How long did it take?

A Are you trying to confuse me or cross-examine me?

Q That's what I am supposed to be doing.

4b pm

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A I mean, let's be realistic. I told you that truck got loaded eight, nine o'clock that night and the next morning it was sold. That ain't no 24 hours. That's only a period of maybe eight or nine hours.

Q I want to know why these trucks are always loaded in the late afternoon rather--

A Because they are filling their regular orders they got during the day.

Q You mentioned a particular kind of roller today, called a tie-up.

A Yes. In other words, when they have eight or nine loads-- truckloads I'm talking about. Not rollers and not freight cars, and I'm not talking about trailers. Truckloads can go anywhere from two to three hundred fifty, four hundred maximum on a truck. They would be tie-ups at the end of the ship after Standard Fruit discharges their cargo and they have maybe a thousand, two thousand, what ever the figure is, that I will probably have maybe four, five, six trucks that are loaded on Ross' truck. Ross is a truckman that delivers its banana for Standard Fruit, which you know. Then they would get placed. That is what you call a tie-up.

Q Did that only occur when the vessel had only a thousand or so boxes left over rather than five thousand

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or ten thousand?

A It happened every time they had from a fruit that they didn't have a home for.

Q Did they always have both tie-ups and rollers, tie-ups being smaller trucks and rollers bigger trucks?

A Not necessarily.

Q What determined when they would have--

A I don't know. Ask Standard Fruit. You're his attorney.

Q In the years 1970 to 1971, and 1971 to 1972, did you buy less of your fruit from Standard than you had in 1968-1969 and 1969-1970?

A I probably did. My business declined a little bit so naturally I bought less.

Q I don't mean in an absolute. I mean did you buy up to, say, 50% of your fruit from other importers?

A Off the top of my head I couldn't give you an answer. I got my records that will tell me exactly. But to give you figures and tomorrow you throw it back to me and you'll say I told you this and it is something else, I'm not getting myself stuck that way, Mister. I'm a banana man, I'm not a counselor.

Q Would you disagree if I were to tell you that Standard's records show that they supplied you in 1970-1971

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and 1971-1972 roughly about half of the costs of goods sold that you have reported on your income tax for those years?

A It might be.

Q That wouldn't surprise you, would it?

A No, nothing will surprise me.

Q Who were you getting the other 50% from in those last three years?

MR. SGARLATO: Objection. That has not been proven. That's a statement by Mr. Brooks and not evidence.

Q Isn't it consistent with your records that in the last two years you were getting approximately 50% of your fruit from some suppliers other than Standard?

A The last two years?

Q I don't mean 1973 through 1975.

I mean 1970-1971 and 1971-1972.

A I don't know. I would have to look up my records to see. I couldn't tell you off the top of my head.

Q Without telling me off the top of your head, I take it the suggestion that was the case is not very surprising to you?

A I don't know. I'm not committing myself until I look and see and I'll give you the answer if you want it.

Q Does the cost of goods sold reported on your federal income tax return reflect accurately the cost of

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the bananas that you purchased?

A Come back.

Does what?

Q Does the cost of goods sold which you reported on these federal income tax returns that Mr. Sgarlato put in evidence as Plaintiff's Exhibit 4, reflect accurately the cost of the bananas that you purchased during those years?

A Naturally.

Q You were only buying bananas. You were not selling onions or anything else?

A No, just bananas.

Q Do you recall changing your purchasing pattern in those last two years at all by purchasing more fruit from other companies than you had previously done?

A What year are you talking about?

Q 1970-1971, 1971-1972. You reported your income tax returns on a calendar year basis, July through June 30, is that right?

A I think so.

Q So I'm talking about those last two years, 1970-1971, 1971-1972.

A I couldn't give you that answer because -- I would just be guessing. But my records that I have would

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verify exactly what I bought from Standard and exactly what I bought from any other company.

Q You have no independent recollection of changing your purchasing pattern during those last two years as you sit here?

A I do not know.

Q You don't have any recollection?

A I don't recall.

Q Isn't that something you would recall?

MR. SGARLATO: Objection.

A I'm not going to make a statement that you are going to cross-examine me and come back and say I said this when I didn't say that.

I don't know. I'm not going to give you an answer that I'm going to say something that I don't know and tomorrow you will tell me you said this and it is wrong.

I don't know so I'm not going to give you the answer, Counselor.

Q You have no recollection one way or the other?

A In my record. That's the only recollection I got. I'll look at my books and tell you exactly right down to the penny what I bought off Standard, what I bought off any other company but to give you a figure right off the top of my head now, I can't tell you.

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Q Did you begin purchasing from any other companies inSeptember 1, 1972?

A I probably did.

Q Do you recall which other companies?

A I bought off Standard, I bought off United a little bit, Pan American, West Indies. R. Dixon. I bought off Tropicana. That's about all the companies.I bought off everybody. I was on friendly terms with all the dealers and I always paid my bills on time and I never had any problem with any of my importers. And I worked like a mule.

MR. BROOKS: I have no further questions of Mr. Lombino.

I would like him to remain available should we wish to call him on our affirmative case.

THE COURT: Any redirect?

MR. SGARLATO: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Lombino, with regard to the rollers or the leftover bananas, if you were offered, let's say five hundred boxes of leftover bananas and you had already placed your order for that week, would you be able to take these rollers and put them in one of your rooms and hold them back from ripening?

hp:mq 7 Lombino-redirect

A I could.

Q How long could you hold them back from ripening?

A About another week.

Q And therefore you could take advantage of that price in the next week, is that correct?

A That's right.

Q You stated, when Mr. Brooks was questioning you, that you ordered better bananas and you paid more money for them.

Are these the premium bananas?

A That's right, that's the only bananas I was referring to.

Q You paid more money when you--.

A That's the only ones.

Q When you ordered Ecuador boxes you paid the price for Ecuador boxes, is that right, so you thought?

A That's right. That's what I thought anyhow.

Q The Bolivar and Guayaquil bananas, does that refer to a type of banana or a place where a banana comes from?

A The place where the banana is grown.

Q And those places are both in Ecuador, are they not?

A They are.

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Q Are those bananas in your opinion of the same quality?

MR. BROOKS: I object.

A They are.

THE WITNESS: Why do you object, Mr. Brooks?

MR. BROOKS: Would you like to know why I object, your Honor?

THE WITNESS: I'm sorry, I'm talking out of turn.

THE COURT: Do you have a ground?

MR. BROOKS: A witness that has not been qualified as an expert.

THE COURT: Overruled.

Q And the Bolivar and the Guayaquil, are they of the same quality, Mr. Lombino?

A The Bolivar?

Q Are those two the same grade and quality?

A I've seen them come just as good as the Bolivar and I've seen the Bolivar as good as Guayaquil, and the Guayaquil better than the Bolivar.

Q When you ordered these bananas from Standard Fruit and Steamship Company, to your knowledge, were you paying the same price for Bolivar as you were for Guayaquil?

A They never mentioned it was Bolivar or Guayaquil. It was Ecuador boxes. They never made a differentiation as

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to whether I was buying Bolivar or Guayaquil.

Q When you spoke to Mr. Sprocco you purchased Ecuador boxes. You didn't purchase Bolivar or Guayaquil?

A That's correct.

Q And he billed you for Ecuador boxes?

A That's all.

Q The box the fruit came in was the same box, was it not?

A Exactly.

Q But if you purchased premium boxes--

A That was a special box.

Q -- then you paid more money?

A It was marked premium and I paid extra for it because I knew that it was a bigger banana and I didn't mind paying the extra premium price for it as long as I got the premium banana.

Q And if you purchased a Cabana box you might have paid a different price, is that correct, as opposed to Ecuador boxes?

MR. BROOKS: I object. I don't think we have entered into the story yet about Cabana.

THE COURT: I have heard it before.

MR. SGARLATO: Mr. Books stipulates that is one of the types they sell, your Honor.

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Q If you purchased Cabana boxes, you would receive a bill for Cabana boxes, is that correct?

A That's correct.

Q And you would pay a different price from Ecuador boxes?

A That's right. Could be more, could be less.

Q But it would be different?

A Yes. The Cabana boxes would say Cabana Honduras or Cabana Costa Rica on the bill.

Q That was a different quality?

A Yes, and came in a different section.

Q The Cavendish, which was included in the Ecuador box, what did that derive its name from, the type or the place from where it came?

A No, as far as I can recall-- you see, Ecuador was very badly infested with stem rot in the banana s... what they did, they grew a new seed, banana seed for the... here new plantations that didn't hit as much stem rot as the previous plantings that they had down there, and that's the name they gave it, Cavendish. It was a cross of two different plantings and they named it Cavendish and that's why they call it Cavendish. It is supposed to be stem rot resistant and the trees are lower, so that when the hurricanes would come in, the wind wouldn't knock the banana plantations

hp:mg 11 Lombino-redirect

down as much as the old growing banana.

Q This Cavendish also came in the Ecuador box?

A Yes.

Q Was this billed as an Ecuador box?

A That I don't know. I don't recall.

Q Would you like to see your invoices to refresh yoru recollection, Mr. Lombino?

A I don't remember seeing any Cavendish Ecuadors. Maybe I did. I wouldn't swear to that, Counselor.

THE COURT: At this time we will take a fifteen-minute recess.

(Recess)

Q Mr. Lombino, during the break did you have an opportunity to look at your invoices for the period 1968 through 1972?

A I did.

Q Did that refresh your recollection?

A It did.

Q Was the term Cavendish ever used in those invoices when you were billed?

A No, sir.

Q How would you be billed for Cavendish bananas?

A Ecuador boxes.

Q In your opinion, are Cavendish bananas of the same grade and quality as Bolivar and Guayaquil and other bananas termed as Ecuador boxes?

A That's right, sir.

Q When you ordered these boxes did the salesmen ever tell you that you were getting Cavendish or Bolivar or Guayaquil?

A No.

Q To your knowledge, was there any difference in price between those bananas?

A No, sir.

Q Did you sell them for the same price?

A That's right.

Q To your knowledge did other banana wholesalers sell them to the retail trade at the same price?

A Some sold cheaper.

Q I am talking about did they sell for the same price within their business?

A Yes.

Q Mr. Lombino, during the period 1968 through '72 did you ever place an order with Standard Fruit & Steamship Company and receive a quote for a price and then receive the bananas at a lower price?

A Never.

Q To your knowledge during the time when you ordered the bananas the one week in advance, at any time from 1968 to 1972 did the market price of those bananas ever go down, throughout those whole four years?

A You mean buying them at one price and getting billed at another price?

Q You said you never were billed at another price, but did the market ever go down so that you should have been billed at another price?

MR. BROOKS: I object to the question, "Should have been billed at another price."

MR. SGARLATO: According to the market condition is what I am referring to.

THE COURT: You are asking did a price of bananas ever drop during that four-year period we are concerned with, from '68 to '72.

MR. SGARLATO: I am asking did the price ever drop during those four years from the time that he purchased bananas to the time he received the shipment at his place of business.

THE WITNESS: It never dropped to me.

Q It never dropped as reflected by your price?

A That's right, sir.

MR. SGARLATO: I have no further questions.

MR. BROOKS: I have one or two, your Honor.

RECROSS EXAMINATION

XX BY MR. BROOKS:

Q Mr. Lombino, how often during the four years would you place an order with Standard, once a week?

A On an average once a week.

Q Roughly say 50 orders a year?

A Good guess.

Q Four years, 200 orders?

A Right.

Q 200 invoices?

A Right.

Q You say you looked at those invoices during the

break?

A I glanced through them.

Q All 200?

A I don't know if I had the whole 200 there. I don't know if my counsel has the whole 200 invoices.

Q Where did you do that? Where were you sitting or standing when you did that?

A Right outside.

Q In the hall?

A Yes, sir.

Q 200 invoices out in the hall, you looked through them all?

A I glanced through them. I didn't see anything with Cavendish on theem.

Q You looked carefully enough so you think you can say under oath Cavendish isn't on any of those 200?

A I think so, sir.

MR. BROOKS: That's all.

THE COURT: You may come down.

We are going to recess now until 9.30 tomorrow morning.

How many more witnesses do you have?

MR. SGARLATO: Your Honor, I have a witness who is here now, he came from his employment, Mr. Elbaum,

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to authenticate some charts he made for me. I don't think he will take too long, but he has been here this afternoon.

THE COURT: All right. Put him on.

- -

S T E V E N S. E L B A U M, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Elbaum, what is your occupation?

A I am presently associated with the law firm of Gifford, Woody, Carter & Hayes, and I am pending admission to the Bar of the State of New York.

Q You have passed the New York State Bar exam?

A Yes, I have.

Q You are a graduate of what law school?

A Brooklyn Law School.

Q Did I hire you last summer to do some legal research for me?

A Spring and summer.

Q Was that on this case?

A Yes, it was.

Q Can you tell me what specifically you did with

regard to this case?

A I researched aspects of the Robinson-Patman Act as it relates to thee allegations made in the complaint and prepared a summation of some points that I thought were relevant and some cases that I gave you with respect to those points.

Q Did you prepare some charts for me?

A Yes, I did.

Q Mr. Elbaum, I want you to look at that exhibit in front of you, Plaintiffs' Exhibit 2 in evidence.

Have you seen that before?

A Yes, I have.

Q Were these charts prepared by using that exhibit?

A Yes, they were.

Q I am going to show you one of these charts, Mr. Elbaum.

Mark this as Plaintiffs' Exhibit 6.

(Plaintiffs' Exhibit 6 was marked for identification.)

xx Q Would you take a look at this chart, Mr. Elbaum. Would you tell me how that was prepared?

A The dates and prices contained in that chart were extracted from Plaintiffs' Exhibit 1.

Q Did you make an appendix to these charts?

A Yes.

Q Does this refresh your recollection?

A Yes, it does.

Q How many of the transactions with regard to consumer pack contained in Plaintiffs' Exhibit 1 were used in this diagram?

THE COURT: When you say Plaintiffs' Exhibit 1, you mean Plaintiffs' Exhibit 2.

MR. SGARLATO: Yes, your Honor. I am sorry.

A That graph encompasses 100 per cent of the sales of consumer pack during the period March 2, 1968 through and including March 9, 1972.

Q Can you tell me the reason why the dates on the chart are April 23, '71 through January 20, 1972?

A I believe the reason for that was that it was during that period of time that the consumer pack sales occurred.

Q Can you explain this diagram to us, Mr. Elbaum?

A This diagram reflects sales to four banana customers by Standard Fruit & Steamship Company as taken from Plaintiffs' Exhibit 1 --

Q Number 2.

A I am sorry.

MR. BROOKS: Would it be all right if I

approached the chart so I can follow?

THE COURT: Yes.

Q You have Lombino indicated by a gold line?

A Yes.

Q Is it correct that throughout this entire chart Mr. Lombino's purchases have remained at a higher rate than any of the other three distributors mentioned?

A My recollection is and looking at it now it seems to me to be that Mr. Lombino at all these dates paid a higher price.

Q For this type of banana?

A For this type of banana and for the same quantity of banana.

MR. SGARLATO: Your Honor, at this time I offer this chart in evidence as Plaintiffs' Exhibit 6.

THE COURT: Any objection?

MR. BROOKS: Yes, your Honor. The same objection as to Plaintiffs' Exhibit 2. I would like to ask the witness a few questions about it.

VOIR DIRE EXAMINATION

BY MR. BROOKS:

Q Mr. Elbaum, when you were presented with Plaintiffs' Exhibit 2 from which to prepare your chart were you told that not all of the purchasers from the

vessel for which Plaintiffs' Exhibit 2 shows purchases were reflected on Plaintiffs's Exhibit 2?

A No, I was not.

Q Would that have affected your chart?

A No, sir.

Q It would not. Suppose all of the purchases that were omitted from Plaintiffs' Exhibit 2 purchased at a price higher than Mr. Lombino, wouldn't you have a group of lines up here above Mr. Lombino, if you were to reflect all purchases from the vessel?

A Certainly, if all purchases were reflected then of course th e would be different prices reflected if that was the case.

Q That would make this chart tell an entirely different story if that were the case, would it not?

A It may.

MR. BROOKS: Your Honor, at this time I object to the admission of the chart. I think Mr. Sgarlato has conceded this morning that the data on Exhibit 2 is selective data. You admitted 2 this morning at the same time granting us permission to put in the full story. I think that adequately also conteracts 2. But I think this is very highly prejudicial since it is admitted that it is based on only selected portions of the evidence.

I think it prejudicial and I object to its admission.

MR. SGARLATO: Your Honor, the plaintiff has a right to inform the Court which sales are discriminatory. We are not claiming that every time Mr. Lombino purchased from Standard Fruit & Steamship Company he was discriminated against. I stated that in Plaintiffs' Exhibit 2 those are the sales that we claim we were specifically discriminated against during that time.

2 This chart will show the Court for certain types of bananas specific comparisons of the plainiff who received favorable prices for the same types of bananas on the same date, and I think these charts show a pattern of discrimination, and I think it would simply matters for the Court if the Court had everything.

If Mr. Brooks has a chart showing all of the sales with more lines than that, I would not object. I have no objection to his exhibit showing all of the transactions. The only thing that I am saying to the Court is that this is our case; this is where we claim the discrimination occurrs.

THE COURT: And that chart covers what period of time again? April what?

MR. SGARLATO: Your Honor, this chart covers the period of 1968 throught 1972, but Mr. Lombino only

purchased this type of banana between April '71 and January '72.

THE COURT: What type of banana?

MR. SGARLATO: Consumer pack is the name of that banana. And that is the only type of banana that is compared in this chart.

THE COURT: What type of banana is that? I think that is the first time I have heard that term, consumer pack. Does that involve all these bananas we were talking about, Cavendish and --

MR. SGARLATO: No, your Honor. This is a different type of banana. Perhaps I should have brought that out, and I will do so. But it is a type of banana that is listed in the defendant's records. He does have certain records for consumer pack in his IBM runs where they are listed together, and we claim that of all the various types of bananas that the defendant sells, he categorizes them and we are using his categories.

THE COURT: That chart then doesn't deal with the various bananas about which the plaintiff testified, the Premium and the Bolivar and the Cavendish?

MR. SGARLATO: He testified that he purchased this type of banana from Standard Fruit & Steamship Company. We didn't go into this type, your Honor,

because there is no controversy as to whether or not there is a difference in bananas under the title consumer pack. There is a controversy as to Ecuador boxes. The defendant is stating that contains diffent types.

THE COURT: The objection is overruled. Let it be admitted.

(Plaintiffs' Exhibit 6 was received in evidence.)

xx MR. BROOKS: May I borrow that?

THE COURT: You can get it after the case is closed. The witness is about to finish.

MR. BROOKS: My associate Miss Solomon would like to look at it while the witness is on the stand.

THE COURT: All right.

(Plaintiffs' Exhibit 7 was marked for identification.)

xx Q Mr. Elbaum, was this chart prepared in the same way as Plaintiffs' Exhibit 6?

A Yes, it was.

Q Does this constitute all of the purchases of Ecuador bananas by, I think this one includes the three plaintiffs; is that correct?

A Yes, it does.

Q What percentage of sales would that include,

of Fcuador boxes sold from March '68 through March '72?

A This represents 100 per cent of all of the Ecuador boxes sold during that time.

Q Lombino again is a gold line and the plaintiff Demarco is a red line and the plaintiff Como Bros. is a pink line?

A Yes.

Q And again their lines are consistently on the top of the chart?

A Yes.

MR. SGARLATO: Your Honor, I offer this in evidence.

MR. BROOKS: May I ask a few questions?

VOIR DIRE EXAMINATION

BY MR. BROOKS:

Q Was this chart based on Exhit 2 as well?

A Yes.

Q Does that chart purport to reflect all of the transactions for the period that was shown on Exhibit 2?

A Yes, it does.

Q And if I asked you the same question about other purchasers from the same vessel that were not shown on Exhibit 2, I take it your answer would be the same, that may affect the way the chart appears?

A They wouldn't affect the chart or the lines that are on the chart. There may be other lines on the graph reflecting different purchasers. But these lines would be accurate as far as these purchasers are concerned.

Q But the impact might be different if those purchasers purchased at higher prices than the plaintiffs, if their lines were higher on here; is that correct.

A That's right.

MR. BROOKS: I object on the same ground.

THE COURT: Overruled.

Let 7 be admitted.

(Plaintiffs' Exhibit 7 was received in evidence.)

xx (Plaintiffs' Exhibits 8-A and 8-B were marked for identification.)

xx BY MR. SGARLATO:

Q Mr. Elbaum, I show you Plaintiffs' Exhibits 8-A and B for identification. Did you prepare this chart?

A Yes.

Q Can you explain to me the manner in which you prepared the chart?

A The two graphs reflected on this chart are

based upon information contained in Plaintiffs' Exhibit 2 and reflects dates of purchase for six customers and prices at which those purchases were made.

Q What percentage of sales for Imperial GM from the period March '68 through March '72 would this include, the purchases listed in Plaintiffs' Exhibit 2?

A I believe this represents with respect to Imperial GM, 85.82 per cent of all of the sales of Imperial GM, and with respect to Ecuador Dole, the graph encompasses 100 per cent of the total quantity of Ecuador Dole sold during that period of time.

MR. SGARLATO: Your Honor, I offer this into evidence.

MR. BROOKS: I have the same objection, your Honor, as the prior one.

THE COURT: Same objection, same ruling.

MR. BROOKS: I would like to ask one additional question as to this chart.

VOIR DIRE EXAMINATION

BY MR. BROOKS:

Q Mr. Elbaum, did you encounter any instance when you prepared this chart of any of these competitors to the plaintiffs placing more than one order for bananas from the same shipment, in other words, let's say Mr. Russo

buying a thousand boxes at $3 and 500 boxes at $2.50?

A I have no recollection of that.

MR. BROOKS: I object for the same reasons as the prior.

THE COURT: Overruled.

(Plaintiffs" Exhibits 8-A and 8-B were received in evidence.)

(Plaintiffs' Exhibit 9 was marked for identification.)

xx BY MR. SGARLATO:

Q Mr. Elbaum, with regard to Costa Rica Cabanas, I show you Plaintiffs' Exhibit 9 for identification.

Was that chart prepared the same way as the other charts you have testified to?

A Yes.

Q What percentage of sales included in Plaintiffs' Exhibit 2 does this include?

A This represents 86.3 per cent of the total quantity of Costa Rica Cabanas sold during this period of time.

Q And again you have the plaintiff Lombino and he is very close to being near the top all the time?

A Yes.

MR. SGARLATO: Your Honor, I would offer this

into evidence.

MR. BROOKS: I would like to ask a question, your Honor.

VOIR DIRE EXAMINATION

BY MR. BROOKS:

Q What happened to the other 13 or 14 per cent that aren't reflected on this chart? Why are they omitted?

A I believe, my recollection is that the omission was predicated on the fact that the remaining percentage consisted of dates that were so scattered that it would be impossible to neatly place them on a graph. I think most of the dates that I used for these graphs is that they are fairly consecutive.

Q Who made the judgment to omit that 13 per cent?

A I made that judgment.

Q Is this chart based on Exhibit 2 as the prior charts?

A Yes, it is.

MR. BROOKS: I make the same objection, your Honor.

THE COURT: All right. Overruled. Let it be received.

(Plaintiffs' Exhibit 9 was received in evidence.)

xx

hph 1

T6

BY MR. SGARLATO:

Q Mr. Elbaum, would you look at Plaintiffs' Exhibit 2. I want you to leaf through that and look for any transaction where one purchaser purchased bananas from the same ship, some bananas at one price and other bananas at another price.

THE COURT: You want him to look through the whole book?

MR. SGARLATO: Just any one.

A I will take the one on the first page, March 7, 1968. I should say there is no indication as to vessel here.

Q Mr. Elbaum, in averaging out those figures, for example, if you were preparing this chart, how would you average out those figures to come up with one price to put that price on this chart? Do you understand my question?

A I'm sorry, I don't.

Q In other words, let's take Plaintiffs' Exhibit 7. Over here for the date March 21, 1968, you have D. Loy purchasing bananas at $2.50 per box.

Just as a hypothetical let's assume that on that date he purchased 500 boxes at $3. and 500 boxes at $2. Would you average that out to make this chart or would you do it a different way?

A I don't recall whether or not I averaged out. I don't think that I did. I think what I took was the highest

price. I believe so. I don't recall.

MR. SGARLATO: No further questions.

MR. BROOKS: I have some questions.

CROSS EXAMINATION

BY MR. BROOKS:

Q Mr. Elbaum, do you recall the date on which you undertook the assignment to prepare these charts?

A Not the precise date but it was either March or April, 1974, in the spring or summer of 1974.

Q Who gave you the assignment?

A Mr. Sgarlato.

Q Did he give you any instructions on how to proceed?

A I should clarify my remarks. As a matter of fact Mr. Sgarlato did not explicitly direct me to prepare charts. He asked me to do some legal research for him in connection with the general complaint and after looking at what is now Plaintiffs' Exhibit 2, I suggested to him that perhaps in the interest of presenting a clear case of the alleged price discrimination we prepare charts. He agreed. Actually in the first instance he didn't direct me to prepare charts but rather the suggestion came from me and he agreed.

Q And you made that suggestion after reading through Plaintiffs' Exhibit 2?

A Well, I don't think that I read it very

exhaustively. It just seemed to me at the outset that given a case of this kind where we are dealing with a large number of dates and a large number of different prices that perhaps some demonstrative evidence would be in order and I thought that charts would be appropriate under the circumstances. I didn't make that conclusion after I had read the exhibit.

Q Mr. Sgarlato called your attention to the page in Exhibit 2 for the shipment of March 7, 1968, I believe. I have a copy of Exhibit 2 and I will put that before you again. That is the page that you looked at a while ago, is it not?

A Yes.

Q I put before you the page reflecting the same shipment from a document that I pre-marked Defendant's Exhibit A-1. Can you tell me whether you notice any differences between those two pages?

A Additional invoices are reflected on this page.

Q Additional purchasers.

A And additional purchasers.

Q Would you say there are about double the number of purchasers on Defendant's A-1 for the same shipment, the March 7th--

MR. SGARLATO: Your Honor, I have no objection

to that record going into evidence, Mr. Brooks' table.

MR. BROOKS: I am not offering it right now. I am cross-examining the witness.

Q Would you say there are about double the number on a 1 than on 2?

A Do you want me to count them?

Q Give a rough estimate.

A I would say there are probably twice as many.

Q You didn't take into account any of the data that is on a 1, is not on 2, did you, when you prepared your charts?

A As a matter of fact to this day I didn't see or look at a 1.

Q Did Mr. Sgarlato tell you that Exhibit 2 only reflected a selected number of the purchasers from each of the vessels when he gave you Exhibit 2 to work with?

A He may have.

Q You don't recall one way or the other?

A No.

MR. BROOKS: No further questions.

MR. SGARLATO: No questions, your Honor.

THE COURT: Thank you, you may come down. We are going to recess until 9:30 tomorrow morning.

MR. BROOKS: Your Honor, I wonder if I can ask the

Court's permission and counsel for the plaintiff to borrow these charts overnight and study them.

MR. BROOKS: Your Honor, I would object at this point. We don't have copies, your Honor.

THE COURT: Normally you should have seen those long before the trial. When you have material like that, exhibits, both sides should have exchanged exhibits before they come into the courtroom. While the court sits here and permits lawyers to go over exhibits they're seeing for the first time, we don't try cases like that here. Lawyers are supposed to exchange documents before the trial. That wasn't done in this case.

MR. BROOKS: Not with the charts.

MR. SGARLATO: It was, your Honor, except the charts were so large I couldn't mail them.

THE COURT: You may take them now overnight.

MR. SGARLATO: Might I request, because Mr. Brooks had stated in his pre-trial order, he would offer charts into evidence, I haven't seen his charts etc.

THE COURT: Let him see yours, Mr. Brooks.

MR. BROOKS: I would be pleased to loan them to Mr. Sgarlato.

(Adjourned to July 10, 1975, at 9:30 A.M.)

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LOMBINO & SONS, INC., et al,

vs. 72 Civ. 1263

STANDARD FRUIT & STEAMSHIP CO.

New York, July 10, 1975;
9.45 o'clock a.m.

(Trial resumed.)

- -

THE COURT: Do you have another witness?

MR. SGARLATO: Yes, your Honor.

- -

M A R Y D e M A R C O , called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mrs. DeMarco, you are the wife of Thomas DeMarco, one of the plaintiffs in this lawsuit?

A I am.

Q Can you tell me what business your husband was in, in the beginning of 1968?

A He was in the banana business, self-employed, in the banana business.

Q Was that wholesale bananas?

A Both wholesale and retail.

Q Can you tell me how long your husband was in that business?

A Well, I would say about 20 years, approximately.

Q And during that time, did you also work in that business?

A No. I kept his books. Other than that, nothing else.

Q Did your husband have any employees in 1968, other than himself?

A No.

Q Are you familiar with the distributors from whom your husband received bananas during the period 1968 up until the time he weent out of the banana business?

A Well, the only one he dealed with was Standard. Other than that, no.

Q Can you tell me when your husband went out of the banana business?

A 1969, late July or August, completely out. Last time he bought from Standard, I believe, was the 19th of July.

Q 1969?

A 1969.

Q Can you tell me on the average approximately

how many boxes of bananas your husband purchased from 1968 until he went out of business?

A I think approximately a hundred boxes.

Q A week?

A Yes.

Q At the end of each day, would your husband bring home cash?

A Yes, he would.

Q What would he do with that cash?

A Well, I counted it.

Q He would give it to you?

A He would give it to me, right. I counted it, posted it, the income, daily. And then usually a day or two later, I would take it to the bank, roll it in coins, you know. It was mostly in coins and single dollars.

Q Did your husband order bananas from your home?

A You mean on the telephone?

Q Yes.

A Yes. I think so, sometimes. Most of the times he went down there, you know, in person, but I think there were occasions when he was on the phone. Most of the times he went down.

Q At the time your husband placed his order, did he obtain a price from the company, the price that he would

receive the bananas at?

MR. BROOKS: I object to the question, your Honor. I don't think there is a foundation laid for this witness to testify to the substance of the telephone conversations, some of them which might have been held at home.

THE COURT: Yes.

Q Did you discuss with your husband the amount he paid for bananas?

A Not really.

Q Who paid the bill? Who would pay the invoice that was sent to you by the banana company?

A I would. I would make the check out.

Q So you would receive the invoice and pay it?

A Right.

Q Did you receive a salary for your work, Mrs. DeMarco?

A No. You know, whatever came out of the business the week was it.

Q Do you know how much of a markup your husband made on bananas?

A I couldn't tell you that. I mean, I really don't know.

Q Mrs. DeMarco, did you keep a ledger book of

your husband's business?

A Yes, I did.

Q Do you have that with you?

A Yes, I have.

Q Is it in the courtroom?

A Yes, it is.

Q Could you get it for us, please?

A Sure. This is the ledger and this is the receipts.

Q Mrs. DeMarco, I am going to show you some income tax returns.

MR. SGARLATO: Could we have these marked as a plaintiffs' exhibit for identification.

(Plaintiffs' Exhibit 10 was marked for identification.)

xx MR. BROOKS: What years are those for?

MR. SGARLATO: We will have the witness testify. It would be '66 through '69, Mr. Brooks.

Q Mrs. DeMarco, are those your joint income tax returns for the year 1966 through 1969?

A Yes, they are.

MR. SGARLATO: Your Honor, I offer those income tax returns into evidence.

THE COURT: Any objection?

MR. BROOKS: No objection.

THE COURT: Received.

(Plaintitfs' Exhibit 10 was received in evidence.)

xx

Q Did you prepare those income tax returns from these ledgers, Mrs. DeMarco?

A Yes.

Q You stated that around July 1969, your husband was not in the banana business any more.

A Yes.

Q Did he go into another business?

A Well, he went into construction a few months later.

MR. SGARLATO: Your Honor, I would like to read from this exhibit, Plaintiffs' Exhibit 10.

In the year 1967, this return shows gross receipts of $19,768, and a net profit of $5008.

In the year 1969 --

MR. BROOKS: Mr. Sgarlato, can you tell us what line of the schedule you are reading from?

MR. SGARLATO: I had a summary, Mr. Brooks I am sorry.

I will withdraw the last statement.

THE COURT: You will withdraw what?

MR. SGARLATO: The statement I just made, your Honor. I had a summary of these records. I'll read directly from the records.

In the year 1967, reading from the 1040 Form, on line 9, the total income is $8876.

In 1969, reading from line 15-A of the 1040 Form, the adjusted gross income shown there is $2907.

Q Mrs. DeMarco, do you know why your husband went out of the banana business?

MR. BROOKS: I object to the form of the question.

THE COURT: Yes, calling for a conclusion.

elh 1 Demarco-direct

T2

Q Mrs. Demarco, did you discuss your husband's business with him?

A Well, we spoke about it.

Q Did your husband ever discuss his competitors with you?

A No.

Q Not specifically by name, but did he ever tell you about other banana distributors that were selling bananas in his area?

MR. BROOKS: Your Honor, I am going to object to testimony about conversations the witness had with her husband, as hearsay.

THE COURT: Sustained.

Q Mrs. Demarco, were you able to maintain the standard of living that you had in 1967 from your husband's income in 1969? Do you understand that question?

A Yes, I do.

Q Were you able to maintain that standard of living?

A You mean in the beginning of '69 while he was still in the business?

Q While he was still in the banana business, could you maintain the standard of living that you had in 1967?

A No, it was getting --

MR. BROOKS: I object to the question, your Honor,

because it is irrelevant.

THE COURT: Yes, sustained.

MR. SGARLATO: On the ground of irrelevancy, your Honor?

THE COURT: Yes. Standard of living has nothing to do with this. The question here is price discrimination isn't it?

MR. SGARLATO: Yes, your Honor.

THE COURT: Not what somebody's standard of living is.

MR. SGARLATO: There is a question of damages involved also, your Honor.

Q Mrs. Demarco, how many hours did your husband work when he was in the banana business?

THE COURT: Do we have any indication of what his income was in '67?

MR. SGARLATO: Yes, your Honor. His income tax records are in evidence.

THE COURT: What was that figure?

MR. SGARLATO: His total income from line 9 was $8,876.

THE COURT: In 1967?

MR. SGARLATO: 1967. And in 1969 his income was $2907.

MR. BROOKS: Your Honor, I think that is a mischaracterization of the evidence. I think the proper comparison between '67 and '69 forms is to compare line 9 of '67, which Mr. Sgarlato first noted, with line 14. He is comparing apples and oranges, or apples and bananas.

I suggest that either the evidence speak for itself or that the same comparisons be made. The adjusted gross income figure in the '69 form is the figure to which the tax is applied. That is, $2907 that appears. It is '67 figure, the figure to which the tax is applied is in line 11D, which is $3745.

While it appears that the IRS has changed their format between '67 and '69, since those two figures, that to which the tax is applied, are the analogous figures, and not the ones that Mr. Sgarlato was comparing.

b2

THE COURT: What do you say, Mr. Sgarlato?

MR. SGARLATO: I am just looking at these forms, your Honor, because if what Mr. Brooks says is true, I will bring it out.

THE COURT: The forms speak for themselves, don't they? They would show what it was in '67 and '69. But whether somebody was able to maintain a standard of living depends on many things.

MR. SGARLATO: On 11D of the '67 return is $3745,

your Honor. And line 15 is of the '69 form is $2907.

MR. BROOKS: 15C I believe it is, Mr. Sgarlato, the one out in the right-hand margin.

MR. SGARLATO: 15C, you are correct, Mr. Brooks.

Q Mrs. DeMarco, when your husband was in the banana business how many hours would he work?

A I would say from 7 to about 7.

Q At the present time what type of business is your husband engaged in?

A He is in construction.

Q What specifically does he do in the construction business?

A He is a laborer.

Q Is your husband working today?

A Yes, he is.

Q Mrs. DeMarco, to your knowledge did your husband ever receive left over bananas from Standard Fruit & Steamship Company?

MR. BROOKS: I object to the question. The witness hasn't demonstrated any competency to tell that fact. Her answer to that question is meaningless.

THE COURT: I think the witness testified she didn't discuss the business very much with her husband; isn't that so?

elh5 DeMarco-direct

Q Did you discuss the business with your husband, Mrs. DeMarco?

A We spoke, we did speak about the business. If it was, you know, if he was paying more or less, and things of that sort.

When you are talking about distributors, different distributors, then, you know, I'm not too knowledgeable on that. But we did discuss what he was paid for bananas, if that is in question here, how much, or too much or too little, or whatever.

Q You have knowledge of that, of how much he was paid for bananas?

MR. BROOKS: I object.

A I did at the time, but don't forget, five years, you know, you really do forget the many things that you discussed. You really do forget.

You asked me now, and I paid the bills and all that, what would an average bill be, I would say I'd have to look. I really wouldn't remember.

MR. BROOKS: That is hearsay, your Honor.

A We have all the bills there.

THE COURT: Yes. If you are asking her what her husband told her, it would be hearsay.

Q Mrs. DeMarco, where did your husband have his

place of business?

A On Mulberry Street, right across from where we lived.

Q Did he own that place of business?

A He rented a basement. That's all it was, it was a basement.

Q Were you ever down there?

A Was I ever down in the basement?

Q Yes.

A Yes.

Q How many refrigerator rooms did he have?

A He had one refrigerator that cooled two rooms, I think it was.

MR. SGARLATO: No further questions of this witness, your Honor.

CROSS EXAMINATION

BY MR. BROOKS:

Q Mrs. DeMarco, do you know whether your husband was requested to be present today?

A Yes, he was asked to be present, but it was very difficult -- do you want to know why he isn't here, is that it?

Q No, I haven't asked that question yet. Do you know whether he was asked?

A He was asked, yes.

elh7 DeMarco-cross
redirect

Q Did he elect not to come?

A Yes, he did.

MR. BROOKS: No further questions.

REDIRECT EXAMINATION

BY MR. SGARLATO:

Q Mrs.DeMarco, could you tell us why your husband couldn't come?

A Yes, I will be very glad to. My husband has been out of work since December --

MR. BROOKS: I object, your Honor. That is hearsay. The only way this witness would know this is by her husband telling her.

THE COURT: Is that so, Mr. Sgarlato?

MR.SGARLATO: No, your Honor. She has knowledge herself of why her husband couldn't come.

Q Do you have knowledge yourself of why your husband couldn't come?

A Yes, I do.

Q Aside from what he said?

A Yes.

Q Are you familiar with his employment now?

A Yes, I am.

Q Would you tell us about that, please?

A Yes. It was very, very urgent that he wouldn't

be here, that he go to work today. My husband has been out of work since December 10th of '74 and just went back to work. And the only reason he did get put on is because he kept going down and going down, and the one day he went down someone wasn't there, he got pushed in. So he couldn't afford the chance--

Q Of losing his job?

A Of losing his job, exactly. Because jobs there are scarce and where he is it's just a matter of a hairline. It's not a thing of that there is two or three years work. It's just a matter of here today and gone tomorrow.

Q Is that his only source of income?

A That is his only source of income.

MR. SGARLATO: Thank you, no further questions.

THE COURT: You may come down.

(Witness excused)

THE COURT: Do you have another witness?

MR. SGARLATO: Yes, your Honor. I have another witness who just came in this morning but I havent had a chance to speak with him. May we have a short recess? It will only take five minutes.

THE COURT: All right.

MR. SGARLATO: Thank you, your Honor.

(Recess)

JOHN F E D E L E , called as a witness by the plaintiffs, being first duly sworn, testified as follows;

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Fedele, are you employed at the present time?

A No.

Q Are you retired?

A I retired about about a week ago, two weeks ago.

Q Before you retired, can you tell us what business you were in?

A In the banana business.

Q Wholesale?

A Wholesale and retail.

Q Can you tell me how long you were in that business?

A About 40 years. I'm 62 now, 62 in September.

Q During that time, did you handle different types of bananas from different places?

A In the 40 years, you mean?

Q Yes.

A Yes, before it used to be all Gros Michel

bananas.

Q And you handled bananas before they came in boxes?

A Yes, I did.

Q You handled them when they came in bunches?

A Yes, strictly bunches at that time.

Q Are you familiar with the different grades and qualities of bananas?

A Yes.

Q From the period 1968 through 1972, will you tell me which banana company you dealt with?

A Mostly Standard Fruit and -- 90 per cent Standard Fruit.

Q And during that time, approximately how many boxes of bananas did you purchase a week from Standard Fruit?

A Well, between 150 to about 250.

Q Mr. Fedele, where was your place of business during the period '68 through '72?

A 7017 13th Avenue, Brooklyn.

Q Did you own this place of business or did you rent?

A I rented.

Q And did you have refrigerated rooms?

A I did.

Q How many refrigerated rooms did you have?

A I had two there and two in another spot where I just stored the fruit.

Q What was your capa ity for storing bananas in all of the refrigerated rooms you had?

A About 450 boxes.

Q Are you familiar with a promotional program that Standard Fruit Company had between '68 and '72?

A Right.

Q Did you participate in that promotional program?

A Well, every time I bought, they give me the promotion.

Q Did you make a saving on the cost of y our bananas?

A It was supposed to be, I think -- I think the last time it was supposed to be 50 cents a box, I believe.

MR. BROOKS: Your Honor, I am going to object to this line of inquiry of this witness. I don't think it is expert testimony. It is factual and it seems to be irrelevant as to thee --

THE COURT: I don't understand the last question anyway.

You asked the witness if he made a savings by

purchasing from the promotional activities?

MR. SGARLATO: Your Honor, this witness will be used as an expert. It is my intention to use him to show a common plan or scheme which was used by the defendant in having various wholesale distributors that were given preferential treatment.

MR. BROOKS: Your Honor, there is no common plan or scheme alleged anywhere in the pleadings of this case. I suggest that that kind of evidence is irrelevant and not within the issues that we are here to try.

MR. SGARLATO: Your Honor, it has been alleged by the exhibits which have been introduced which show constant preferential treatment given to certain other distributors and I think that speaks for itself.

THE COURT: Let's go back to that last question.

The question of the witness is whether, as a result of taking advantage of the offers in the promotional material, he was able to save on the purchase of his bananas in the period '68 through '72.

Is that the question?

MR. SGARLATO: Yes, your Honor.

THE COURT: Do you understand the question?

THE WITNESS: Yes.

A I don't think they had the promotion too long

I exactly don't know the dates they had those promotions. I can't remember. They might have had it for a year or two, I believe. I don't think it was much longer than that.

THE COURT: The question is, were you able to make a saving by taking advantage of those?

THE WITNESS: Most of the time, yes.

Q You say the savings were approximately 50 cents a box?

A Well, at one time it was 50. Before that, it was a little less. I can't recall if it was less or not.

Q Mr. Fedele, are you familiar with the terms Bolivar bananas and Guayaquil bananas and Cavendish bananas?

A Yes.

Q During the period '68 through '72, did you purchase these types of bananas?

A Yes. '68 to the latter part of '69, I bought this Imperial banana and after '69, they discontinued all Gros Michel bananas and only imported Cavendish banana. It was a new strain of banana because the other bananas were mostly diseased and, you know, poor quality. They got a better quality, I believe, out of the Cavendish.

Q When you say Imperial and Gros Michel, are you

referring to the same type of banana?

A At that time, yes.

Q And they were referred to as Imperial GM's?

A Yes.

Q Were they billed as such by Standard Fruit & Steamship Company?

A Right.

Q Did you ever receive Cabanas?

A Cabana was a brand name. All bananas Standard brought in, I believe out of Ecuador, Honduras or Costa Rica, I think they named them Cabanas.

Q When you were billed for Cabanas, there was no other distinction aside from the fact that these were Costa Rica bananas?

A Yes, they marked --

MR. BROOKS: I object to the question as leading and to the line of inquiry as irrelevant. It is not expert testimony; it is factual. What happened to Mr. Fedele in his dealings with the defendant has no relevance with the plaintiff's dealings with the defendant.

THE COURT: Overruled.

A My bills were marked Ecuador Honduras Cabanas or Costa Rica Cabanas.

Q When you purchased a Bolivar, Guayaquil or

Cavendish bananas, how were you billed? How did the invoices describe the bananas?

A The bills were just Ecuador, Ecuador bananas or Ecuador Doles.

In '68 and '69 I didn't buy no -- in the latter part of '69, it was all Cavendish but previous to that, it was all -- they might have had other brands but I only bought the Imperials in '68 and '69. Then they changed to Cavendish. It was all Cavendish after that.

Q Mr. Fedele, are the Bolivar and Guayaquil bananas of the same quality?

A They all came out of Ecuador.

MR. BROOKS: I move to strike the answer as not responsive.

THE COURT: Yes.

Q Are the Bolivar and Guayaquil bananas of the same grade and quality?

A Yes.

Q And to your knowledge, were they basically the same price from Standard Fruit & Steamship Company?

A Yes.

Q When you were receiving Cavendish bananas, did they also sell the Bolivar and Guayaquil at that time?

A That I couldn't tell you because I was only

buying the Imperial in '68 and '69.

Q Do you have knowledge of the prices being charged for the Ecuador boxes while you were buying Imperials?

A Yes, it was all one price.

Q In other words, all types of Ecuador boxes were one price regardless of whether they were a Cavendish or Guayquil or Bolivar?

A Yes.

Q Did you ever purchase Ecuador premium boxes?

A I looked through my bills. I found only two on Premiums.

Q Were they more expensive than the Ecuador boxes?

A I don't think so. They only had a small amount on these boats, of Premium and Imperials, I believe.

Q You didn't buy them very often?

A Only I bought Imperials mostly.

Q Was there a difference in price between the Imperial and Ecuador boxes?

A I don't think so.

MR. BROOKS: I move to strike the question as not responsive -- I mean, the answer.

THE COURT: Let me hear the question and

answer, Mr. Reporter.

(Question and answer read.)

THE COUT: You are moving to strike that as not responsive?

MR. BROOKS: It should be, yes, no, or "I don't know."

MR. SGARLATO: I disagree.

THE COURT: Do you know whether there was a difference in price?

THE WITNESS: I don't know, because I used to call up for Imperials and they used to give me the price of the Imperial and I never bothered to ask the price of the other brands they had on the boats.

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THE COURT: He doesn't know, then, is that it?

MR. SGARLATO: He doesn't know, then.

Q Was there a difference between the quality of the Imperial GM and the Ecuador boxes?

A At that time the Imperial ran pretty good, and then after they ran very bad.

THE COURT: What time?

THE WITNESS: The latter part of '69 -- before they gave up the Imperials or they changed everything to Cavendish, the Imperials were running very bad. In fact, you had more waste in the Imperial boxes than the other brands of bananas, of Ecuador.

MR. SGARLATO: Your Honor, I am trying to ask Mr. Fedele questions from a proposed exhibit of the defendants and it was stipulated by the parties that these are accurate transactions which took place between all the customers mentioned in the defendant's exhibits. It was so stipulated in the pre-trial order, that these are accurate.

THE COURT: The defendant has compiled an exhibit which contains all of the transactions during the years in question?

MR. SGARLATO: Yes, your Honor.

THE COURT: By the defendant, is that it?

MR. SGARLATO: It has been compiled by the defendant

and I have stipulated that it was accurate, and it contains all the transactions that the plaintiffs were involved in during the time in question, and it also contains transactions of other distributors, including Mr. Fedele.

THE COURT: All of the defendants?

MR. SGARLATO: Yes, your Honor.

THE COURT: During the years in question?

MR. BROOKS: If I may clarify, it is a chart of all of the transactions through which the defendant sold bananas in the metropolitan New York area during the four years involved in this lawsuit, whether they involved the plaintiffs or not.

THE COURT: All right.

Q The shipment that I am reading from is March 7, 1968, the customer's name is John Fedele, invoice number 50095. Mr. Fedele, at that time you purchased 225 Ecuador boxes at $2.60 a box.

A I can't recall the date now, the price.

Q You don't have to recall. I am telling you this, Mr. Fedele. $2.60 a box for 225 boxes, Ecuador boxes.

A Right.

Q From that same shipment a customer named Frank Ricigliano purchased 175 boxes, Ecuador boxes for $2.20.

Can you tell me the reason why Mr. Ricigliano

purchased bananas for less than you?

A No, I can't.

Q Did you order your bananas from Mr. Roger Sbrocco?

A Standard Fruit Company, yes. Was that Ecuador fruit?

b2 Q Ecuador boxes, Mr. Fedele. Were those boxes of the same grade and quality?

A Yes.

THE COURT: What was the name of the box?

MR. SGARLATO: Ecuador box, your Honor.

A They weren't marked Imperial?

Q No.

A No.

THE COURT: I don't follow that. Both boxes are marked Imperial?

THE WITNESS: No, Ecuador boxes.

THE COURT: And one price was what?

MR. SGARLATO: $2.60 per box and one price was $2.20 per box.

THE COURT: What date?

MR. SGARLATO: That was March 7, 1968.

Q Mr. Fedele, from that same ship Frank Russo purchased 200 Ecuador boxes for -- I'm sorry, Frank Russo purchased 500

Ecuador boxes for $2 a box; he purchased 1,400 Ecuador boxes for $2.40 a box, and he purchased 600 Ecuador boxes for $2.10 a box.

Do you know the reason why Mr. Russo was charged less than you?

A No, I don't.

Q Did Mr. Sbrocco ever tell you that you could have paid less for these Ecuador boxes?

A No, sir.

Q Did anyone in the company tell you they were available for less money?

A No. The only time I bought bananas, I put my order in, they gave me a price and when they gave me a bill that is the price I paid.

Q Did Mr. Sbrocco tell you that other customers were paying less money than you?

A No. I complained a couple of times.

Q Why did you complain, Mr. Fedele?

A Well, because I had customers that used to go up to Hunts Point market and they could purchase bananas at less than I bought them from the dock.

Q Can you tell me the names of those wholesalers at the Hunts Point market?

A Mainly D. Loi.

Q Would you spell that?

A I think it's [illegible], the first name is Dominick, and it's L-o-i, I believe. I'm not sure.

Q Okay. Mr. Fedele, again reading from the Defendant's proposed exhibit on March 14, 1968, you purchased 185 Ecuador boxes for $2.80 a box. Park Avenue Banana purchased 150 boxes for $2.50 a box. Ecuador boxes.

A How much did I pay?

Q You paid $2.80; Park Avenue Banana paid $2.50; H. Mileo purchased Ecuador boxes for $2.50. Banana Distributors of New York purchased 800 boxes for $2.50; Frank Ricigliano purchased 175 boxes for $2.60; Frank Russo purchased 1050 boxes for $2.50.

Can you tell me the reason for the difference in those prices?

A I cannot.

Q Were you told for that shipment that other distributors were paying less than you for Ecuador boxes?

A That's right.

Q Were you ever told that by the company?

A By the company, never.

Q Again reading from the same proposed exhibit, your Honor, Mr. Fedele, on March 28, 1960 -- by the way, was Esposito one of your competitors in Brooklyn?

A Yes.

Q March 28, 1968, you purchased 200 boxes for $2.80 a box. They were Ecuador boxes.

A Right.

Q Did you know that from that same ship Esposito Bananas purchased 500 boxes for $2, 500 boxes for $2.50, 300 boxes for $1.80, and another 300 boxes for $1.80, so that is a total of 600 boxes for $1.80.

A I never knew that.

Q You never knew that?

A Never knew that.

Q Can you think of any reason why that would happen?

A I cannot.

Q Did you know that D. Loi purchased from that same shipment 1,600 boxes for $1.50, which is $1.30 below what you paid per box?

A I did not.

Q Did you know that Frank Russo purchased 900 boxes for $1.60 and 1,500 boxes for $2.50 and 250 boxes for $2, another 250 boxes for $2, and 1,200 boxes for $1.60, all of Ecuador boxes.

A I did not.

Q Does that surprise you?

A Very much.

Q Would you be able to compete with these men if they were paying these prices?

A Never in a million years.

Q Did you have difficulty competing?

A I did.

Q Did your customers ever tell you they were paying less for bananas?

A Well, they always told me they could buy a lot less than I was delivering.

Q Did you believe them?

A I did.

Q Do you believe them now?

A I believe them now.

Q Did you know that from that same shipment on March 28th of '68, Stricks & Schwartz bought 700 boxes for $2 and 700 boxes for $1.70 while you were paying $2.80?

A I did not.

MR. BROOKS: Your Honor, I don't see why we need to continue this line of questioning. It's pretty apparent that the witness has no knowledge of the other transactions. His answer would be the same as to all of them. The document speaks for itself. Mr. Sgarlato can make his argument in post-trial summation or in his brief if he wishes.

THE COURT: I think, Mr. Sgarlato, you are asking

him about the plaintiff's own exhibits which shows these differentials.

MR.SGARLATO: These are defendant's exhibits, your Honor.

THE COURT: I meant to say defendant. The defendant put that in, did he not?

MR. SGARLATO: Yes, your Honor.

THE COURT: And those exhibits show price differentials.

MR. SGARLATO: Yes, your Honor.

THE COURT: Why are you asking thiswitness about those?

MR. SGARLATO: Your Honor, I'd like to bring out the fact that other wholesalers were also discriminated against and it shows this common plan or scheme that I am talking about.

THE COURT: It shows it on there, according to you. It shows that he paid.$2.80 a box, somebody else paid $1.50, doesn't it?

MR. SGARLATO: Yes, your Honor.

THE COURT: Then why are you asking him about it, if it shows that?

MR. SGARLATO: Because, your Honor, this is so voluminous, I didn't intend to go through each transaction.

THE COURT: If it is in evidence, it is in evidence, isn't it? The whole thing, as voluminous as it is, is in evidence, isn't it?

MR. SGARLATO: Yes, your Honor. I am trying to ascertain whether or not this witness had any knowledge of these differences in price.

THE COURT: He's just told us he did not, isn't that so? You have given him several examples.

Q Throughout this time, Mr. Fedele -- by the way, these were just transactions in March of '68, your Honor, and that was each time Mr. Fedele was mentioned from the beginning of this book, where I have shown discriminatory sales or differences in price, at least.

Mr. Fedele, do you know what the term rollers means?

A Yes.

Q Can you explain that for us?

A To me a roller should be bananas sold at the end of the ship, that are not sold. Bananas that are not sold at the end of the ship.

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Q Did you ever have knowledge --

THE COURT: You mean at the end of the unloading of the ship?

THE WITNESS: Yes, when the ship was pretty near

finished they didn't have customers for them, they were supposed to be rollers.

Q Did you ever have knowledge in advance of when there would be bananas left over?

A Me, know.

Q Do you know of anyone else that did?

A Well, I think -- I am assuming --

Q Don't assume, Mr. Fidele.

A All right.

Q Did you ever have that knowledge?

A No, I never had a roller.

Q Let me ask you a hypothetical question.

If you had knowledge that there would be rollers left over when you were placing your order, would you have ordered differently?

A I could have ordered a little bit more.

MR. BROOKS: I object, your Honor. I think it is irrelevant and improper form.

THE COURT: Let me hear the question.

(Question read)

THE COURT: What is the answer?

THE WITNESS: Yes, I would have ordered a few more for a less price.

THE COURT: Are you saying you did not have knowledge--

THE WITNESS: I did not.

THE COURT: -- of times when there were rollers?

THE WITNESS: I did not. They never asked us, if there you know, that the ship wasn't sold out or not. We never knew. I mean, I never knew.

Q Did you ever purchase rollers, Mr. Fedele?

A No, I did not.

Q Did you ever ask for them?

A No, I did not, because I never knew if there were rollers or not. I used to find out the next day that people bought rollers.

Q Who did you order from, in 1968 through 1972?

A Mostly Standard Fruit.

Q What particular person? Was there a salesman that you ordered from?

A No, I used to call up the office and whoever the salesman answered the phone that would take the order, I --

Q Did you ever order from Roger Sbrocco?

A I believe I did.

Q Did you ever tell Mr. Sbrocco or any of the other salesman that if he had any rollers you would like to purchase them?

A Did I ask him?

Q Did you ever tell Mr. Sbrocco that you would

purchase rollers if they were made available to you?

A No, I did not.

Q You never told anyone?

A No, I did not, because I never knew if there was rollers or not.

Q Were rollers ever offered to you?

A No.

Q Mr. Fedele, when you ordered bananas and before you purchased them did the market price ever go down?

A I believe I got the market price -- if I called up on a Friday for bananas on the following week and they quoted me $5.10, for instance, that is a price and the market was very weak the following week that we got the bananas, everybody was billed $4.80, in case that was the price; I mean $4.80.

I am just giving you a price. Everybody got it for the same price.

Q That would be from the same ship?

A Same ship, yes.

Q For the same type of banana?

A Right.

MR. BROOKS: Move to strike the testimony about "Everybody got it for the same price." There is no foundation for this witness knowing --

THE WITNESS: I am assuming everybody should have got it for the same price.

THE COURT: All right. The motion is to strike?

MR. BROOKS: Yes, there is a motion to strike the answer that everybody got it for the same price.

THE COURT: The motion to strike the answer has been sustained on the ground this witness does not know what everybody got the bananas at.

Q Mr. Fedele, how often did you order bananas?

A Once a week mostly.

Q And did you always order from a different ship that came in each week?

A I mostly ordered Ecuador. If they had Ecuador that week, the following week -- well, we put in an order on Friday for the following week. If they had Ecuador, I would prefer the Ecuador.

Q Mr. Fedele, you stated that you received a lesser price once in a while because of a market condition.

A Maybe a couple of times. Very, very seldom.

Q In the period from 1968 to 1982, can you tell me approximately how many times that happened?

A I don't think a half a dozen times.

THE COURT: A different price? You mean a lower price?

THE WITNESS: A lower price than they quoted us.

Q Mr. Fedele, when you sold your bananas, what kind of markup did you use?

A Well, we used to -- the average banana man's --

Q No, you.

A It was $1.20 above the Seaboard price.

Q What would your net profit be out of that $1.20?

A An average of 50 cents a box.

Q Did you ever try to sell your bananas for more than $1.20 above Seaboard?

A No, you could not. In the banana business it's a funny thing. Everybody -- if the market was a strong market, everybody pretty near got the same price. No matter if you went to Hunts Point, Brooklyn Market. That's when the market was very strong. Everybody sold practically the same price. You couldn't get a quarter more a box.

Q To your knowledge, do you know of any customers that were paying less for bananas than you were able to supply them?

A Throughout the year, yes.

Q Do you have any particular instances of any customers that you lost or any customers that you know of?

A Yes, a couple.

Q Can you tell us about it?

A I don't know exactly the market price I paid for bananas that day. Say I sold to him for $3 and he

went to Hunts Point and showed me a bill for two and a half dollars.

Q Do you know who he bought his bananas from?

A Mostly they used to go to D. Loi.

Q What was the name of that customer?

A Ydward Polombo.

Q Did you keep him as one of your customers?

A I lost him after. He could always buy there cheaper than I could deliver him.

Q Did you ever purchase bananas from Frank Russo, Mr Fedele?

A I believe I did.

Q Did you ever purchase Standard Fruit bananas from Mr. Russo?

A I did.

Q When you purchased them, did you pay the same price that Standard Fruit & Steamship Company was charging, would have charged during that week?

A I bought it for a lot less.

MR. BROOKS: Objection. There is no foundation he knows what Standard Fruit & Steamship would have charged him that week.

THE COURT: When are we talking about, Mr. Sgarlato?

Q When was this, approximately?

A Every time I ran short of bananas I used to go down to Frank Russo.

Q Approximately how many times did that occur from 1968 through 1972?

A Maybe two dozen times.

Q And at the time that you went down there, we you familiar with the price that Standard Fruit & Steamship Company was getting for their bananas?

A I was.

Q You purchased your bananas from Mr. Russo?

A That's right.

Q Can you compare the price you paid Mr. Russo from the price Standard was charging?

A A lot less.

Q It was less?

A A lot less.

Q Do you know why that was?

A No, I do not.

Q Were you very friendly with Mr. Russo?

A Well, I knew every banana man. I'm not that friendly, no. Business is business.

Q Were you so friendly he would have taken a loss?

A That he should take a loss?

Q Yes.

A No. He never took a loss.

Q Did you ever have a conversation with Mr. Russo about the reason why his bananas were purchased for that much?

A No.

Q Were these the same grade and quality of bananas that you could have purchased from Standard Fruit & Steamship Company?

A Yes, that's right.

Q Were they Ecuador bananas?

A Most of the time, yes.

Q Did they come in boxes from Standard Fruit & Steamship Company?

A Standard Fruit boxes, right.

MR. SGARLATO: I have no further questions.

CROSS EXAMINATION

XX BY MR. BROOKS:

Q Mr. Fedele, I believe you said you retired recently, is that correct?

A Yes. The first of this month.

Q Did you continue in much the same business that you have described to us as you having been in, in 1968

through 1972, up until the time you retired?

A Yes, wholesale and retail.

Q Who did you purchase bananas from during the years '72 through '75?

A I think last year I was buying from Tropicana. Previous, before that, I was buying from Standard.

Q After you noticed that Mr. Russo can sell you bananas at a better price than you could get them directly from Standard, did you direct all your business to Mr. Russo and take advantage of that opportunity?

A No.

Q Why not?

A Because I'm an old-timer and I like to buy off the boat, ripen my own.

Q Was there any difference between the bananas you could get from Mr. Russo at the lower price than those you could get right off the boat?

A No.

Q Then why wouldn't you take advantage of the cheaper bananas?

A Why should I? I want to be in the banana business on my own. I don't want to buy from somebody else because maybe at a certain time, at certain times he wouldn't have them and then I would have to go back to

the company.

Q Did Mr. Russo ever not have bananas?

A You mean when I went to buy off him?

Q Yes.

A He always had them.

Q You never knew of a time when you couldn't get bananas from Frank Russo?

A Never. Maybe during a strike.

Q Nobody got them during the strike.

A They got them out of Charleston and Baltimore.

Q If the price --

A Can I say something for a minute? I think it was Roger, he wanted to get me a trailer from South Carolina and he quoted me a price and I found out Frank Russo brought the trailer from Carolina for much less than what Rogers quoted me.

Q Mr. Russo always had bananas available at a price cheaper than --

A If I wanted to go down there, yes. All kinds. Not only Standard.

Q Is there some difference in your going down there?

A Yes. When I ran short and didn't have enough ripe or turning bananas, I went down to Russo.

Q And you got a better price, you testified?

A That's right.

Q Why didn't you always go down to Mr. Russo?

A Why should I? When the market is strong, maybe he wouldn't have the bananas, the amount that I wanted, and I couldn't go to the company because then the company wouldn't give me the bananas. In fact, not so long ago, I ordered a load of bananas from Standard, and this was during the hurricane season, they lost a lot of fruit down there and I couldn't get a load because they were short. So, I couldn't go down and ask him for bananas.

2 THE COURT: Why would the company not give you --

THE WITNESS: They didn't have enough for their own customers because I wasn't a steady customer the last year. They would have refused me. In fact, they did refuse me.

Q When was the first time you noticed this difference in price that D. Loi was able to --

A Can I say something?

Q No.

A This has been going on before '68. I was in the business after the war. These deals have been going on since after the war until now.

Q Did you know --

THE COURT: Mr. Fedele, the lawyer is permitted to ask you questions. If you volunteer something and he doesn't want to have that in his case, you have to wait until Mr. Sgarlato gets up and he will bring out anything that he thinks needs to be brought out.

Please do not volunteer any more.

THE WITNESS: I'm sorry.

Q I take it you knew about this fairly early in the game then, these deals?

A These deals were always going on, yes, sir. Not that I could prove them.

Q But you knew in your own mind?

A I knew in my own mind, yes.

Q You also knew that there were other importers in the metroplitan area, like United, Pan American, West Indies?

A Yes.

Q Why didn't you take your trade to those other importers rather than stick with Standard if they were giving you shabby treatment?

A I would rather deal with Standard than the other importers because they weren't too steady. Pan American or the West Indies, they weren't too steady.

Standard and United Fruit were the most steady and United Fruit, I didn't care for their bananas.

Q Mr. Fedele, do you think there is a difference between Bolivar Ecuador bananas and Guayaquil Ecuador bananas?

A I don't think so.

Q They are all the same?

A All the same.

Q Did you ever specify one kind r the other?

A No, sir.

Q Do you think there are some banana men that believe there is a difference between the two?

MR. SGARLATO: Objection. How would he know?

MR. BROOKS: He has been offered as an expert.

MR. SGARLATO: For his own opinion, but not the opinion of others.

THE COURT: He has been associated with others in the trade.

A Ask me the question again. I'll answer it.

Q Is there a recognized body of opinion in the banana trade that judges Bolivar Ecuador bananas to be superior to Guayaquil Ecuador bananas?

A No. I think the average buyer bought for price. He didn't care what kind of bananas he got.

Q You are talking about the jobber?

A Yes.

Q what kind of customers did you have? Can you characterize them? Fruit stores, chains?

A Yes, fruit stores and I used to sell a lot myself, retail.

Q Retail?

A Yes.

Q Did you ever have a retail shop?

A I did.

Q Did you ever request from Standard a top quality banana?

A The only top quality banana at that time was Imperial.

Q I am not asking you what there was available. I am asking you did you ever, in words or substance, make that kind of a request?

A After '69 there was only one kind of a banana, Cavendish. That was the only banana they had to sell and when I put it in my order, I put in my order for Ecuador and whatever they sent me, that's what I took.

Q And you never made a request for top quality?

A I don't think they had -- if they had Bolivar or Guayaquil, I didn't know the difference because it was

all Cavendish fruit.

Q When did you place your order usually, the week before?

A Mostly Friday. This is before the pre-order now. I used to call in Friday for the following week.

Q When you did, am I correct that you understood that you were getting the Seaboard quote?

A That's right.

Q Did you, as a man knowledgeable in the banana industry, know that banana companies, whether they be Standard, United or Pan American, would lower their price on occasion from the Seaboard price if they were going to be undersold?

A I never knew that.

Q You never knew that?

A No, sir, because the only people --if I gave an order from Standard, I bought it from Standard. I didn't call anybody else to find out what their prices were.

Q Mr. Sgarlato asked you a question about one of the pages in Defendant's Exhibit A-1 for identification. I would like to show that to you. This is the page for the March 14, 1968 shipment, on the Santa Mariana. He asked you about your purchase 280.

I show you also the D. Loi & Sons purchase from the same vessel, at the same price. Do you see that there?

A Yes.

Q Do you know why they got the same prices you got?

A The market was very strong and they didn't have no rollers to offer the people.

Q You know that?

A I'm pretty sure of that.

Q Let me ask you then, do you have any knowledge of why Alpino got Ecuador bananas at 250 from that same --

A I do not.

Q Or why Ricigliano got it at 260, or called Ecuador bananas?

A No, I don't.

Q Did you judge D. Loi & Sons to be one of the favorite operators?

A I do. I think they buy most of their bananas from Standard Fruit.

Q I think you testified that their place of business is in the Hunts Point Market in the Bronx?

A I believe they have two places. They have one ins Hunts Point and one outside the market. I do not

know where.

Q I think you estified you concluded that they were getting a favorice price because one of your customers could go up there and buy bananas at a price cheaper than you could afrord to sell to that customer?

A That's right.

Q Did you accompany that customer on that trip?

A Never.

Q How do you know what bananas the customer purchased from D. Loi?

I've seen it on his truck and I've seen his bills.

Q How much lower were they than the amount that you could have afforded --

A About 50 cents.

Q Was it your custom to deliver to your customers?

A Yes, sir, all my customers were delivered.

Q Didn't D. Loi require customers to pick up from D. Loi?

A In the market, yes. Outside the market, the other place I do not know. He delivers outside.

Q You testified that this customer you were losing sales to would go to the Hunts Point Market to pick up?

A Yes.

Q You would provide a service that D. Loi did not provide, to wit, delivery?

A I knew the customer for so many years, he wouldn't change me for love of money but for price anybody changes.

Q Did you supply an added service that D. Loi did not supply?

A It didn't amount to that much. The man must have had deals.

Q How much do you think it cost per box to deliver as opposed to not delivering? Did you ever work that out?

A It didn't cost me a quarter a box. I had a small station wagon and I delivered about 10, 15 boxes a day.

Q What did that quarter reflect?

A Maybe gas, car insurance. I parked it in the street. That's about all.

Q How about the time or the wages of the man driving?

A Time don't mean nothing to me. I work 12 hours a day. It don't mean nothing. I worked 24 hours a day.

Q You had to pick up from Mr. Russo, didn't you?

A That's right.

Q During the 40 years that you have told us you were in the banana business, was that your only business?

A Yes.

Q You were self-employed?

A Yes. I had two brothers working with me, we were partners. When the market closed, I got out of there and I went in for myself.

Q What income do you have now to support your retirement?

MR. SGARLATO: Objection.

A I go into Social Security in two, three months and the earnings I made.

Q From the 40 years in the banana business?

A Right.

Q How old are you now?

A I'll be 62 in September.

MR. BROOKS: No further questions.

REDIRECT EXAMINATION

XX BY MR. SGARLATO:

Q Mr. Fedele, are you familiar with the Hunts Point Market?

A Well, pretty familiar. I was up there two or three times.

Q Can you describe the market?

THE COURT: Is this something brought out on cross-examination?

MR. SGARLATO: Yes, your Honor.

THE COURT: Did you go into this on cross-examination?

MR. BROOKS: I don't think so. I didn't ask him what Hunts Point looked like.

MR. SGARLATO: Mr. Brooks went into the fact that the bananas were picked up at the Hunts Point Market and that therefore the cost should have been less.

THE COURT: I see. All right.

MR. SGARLATO: I would like to describe the market so the Court will see the operations of the market.

BY MR. SGARLATO:

Q Will you describe the Hunts Point Market for us?

A It's a new market, a very big market. I don't know how many acres it is.

Q Is there a bigger one in the City of New York?

A That's the biggest one, I think, in probably the United States right now.

Q How new is it?

A I don't think it's 10 years old.

Q As far as fruit markets go, would you describe this market as -- well, how would you describe it?

THE COURT: Is it a wholesale or retail market?

THE WITNESS: All wholesale.

Q Do jobbers go there and purchase different types of fruit and vegetables?

A That's right.

Q Is that the main source to purchase fruits and vegetables?

A No, you could buy in the Brooklyn Market. It's a smaller market, very small market and then you probably have maybe a couple of smaller wholesale markets, dealers, you know, in the City. That was the main one. The Hunts Point, Bronx Terminal and Brooklyn Markets are the three main markets in the City.

Q Do you know of any other fruit market in the New York City vicinity that is more exclusive than that Hunts Point Market?

A I do not.

MR. BROOKS: I object to the form of the question.

THE COURT: I don't understand.

More exclusive?

THE WITNESS: They have a bigger quality, bigger amount.

Q Do you know of any market in the New York City area that has more outlets than Hunts Point?

A I believe not. I think that's about the biggest.

Q And compared to your operating expenses, the operating expenses that you had in your business, in your

opinion, would it be more expensive to operate your business from the Hunts Point Market?

MR. BROOKS: I object to the form of the question. There is no foundation Mr. Fedele knew anything about the cost of business in the Hunts Point Market.

THE COURT: Yes. Sustained.

Q Can you describe Mr. D. Loi's place of business in the Hunts Point Market?

A Yes. I was up there. He had about six, seven rooms for bananas, I believe.

Q Were the rooms larger than yours?

A Ten times bigger than mine.

Q Can you tell me, did he have men working for him?

A Quite a few men, yes.

Q When you say quite a few, would you say more than ten?

A I didn't see ten. I mean about seven, eight.

Q Did he have an office in his place of business?

A Well, the fellow had a desk in the corner there.

Q Did he have a place where trucks could back up to a loading dock?

A All the trucks back up to platforms in Hunts

Point.

Q What part of the market is Mr. D. Loi in?

A He's in the market. There is no special place. Each individual in the market has a store, which they call a store, and he has, I believe, what they call, you know, a store, where they wholesale.

Q How many employees did you say you had throughout the period '68 through --

A No employees. Only my two brothers and myself.

Q And you were partners?

A Partners, yes.

MR. SGARLATO: I have no further questions.

RECROSS EXAMINATION

XX BY MR. BROOKS:

Q When you got your boxes from Standard Fruit, do you recall what coloring was on the boxes?

A Of the boxes?

Q Do you recall the color of the ink that applied the printing?

A Ecuador boxes was all one.

Q What color do you recall being on the box, if any?

A Brown. It was a corrugated sort of a brown

box.

Q A brown box?

A Yes. Not dark brown. Light.

Q How about the lettering on the box which might have said Ecuador Bananas or Standard Fruit; do you recall the coloring of the lettering?

A No, I don't. Red or blue. I don't remember.

Q Red or blue?

A Red or blue. I don't remember.

THE COURT: At this time we will take a 15-minute recess.

Witness is excused.

(Recess.)

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MR. SGARLATO: I would like to recall Mr. Lombino.

THE COURT: For what purpose?

MR.SGARLATO: Well, if your Honor recalls, yesterday Mr. Brooks asked Mr. Lombino about the volume of business he was doing with Standard Fruit and he asked Mr. Lombino to go over some records which Mr. Lombino has done, and I would like to have him testify to that.

MR. BROOKS: Your Honor, I didn't ask Mr. Lombino to go over any records for me and I don't respond to his testifying. Further, your Honor, I am prepared to handle it in my own way.

MR. SGARLATO: I would like to recall Mr. Lombino to clarify that. He's gone over his records last night and I think he could clarify what was said yesterday.

THE COURT: The records now in evidence do not disclose the volume of his business? I thought you put in all of his purchases from the defendant for the years in question.

MR. SGARLATO: They don't disclose the volume of business he did with Standard Fruit as opposed to other banana companies, your Honor.

THE COURT: I see. You can put him on for that purpose.

M I C H A E L L O M B I N O, recalled.

THE COURT: Mr. Lombino, you are still under oath, having been previously sworn.

THE WITNESS: Yes, your Honor.

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Lombino, did you review some of your records last night?

A I did.

Q Tell us what records they were?

A I reviewed 1971 and '72 records last night. That was all I had time for because I am trying to run a business and be here at the same time. It's pretty rough.

Q Did these records refresh your recollection as to the volume of business you did with Standard Fruit & Steamship Company as opposed to other banana companies?

A Yes. '71 and '72 records showed that I bought about 50/50 between Standard and the rest of the other companies.

Q You didn't review records prior to that time?

A No, sir.

Q And your testimony is still the same, you purchased about 75 per cent from Standard?

A Roughly.

MR. SGARLATO: No further questions, your Honor.

MR. BROOKS: No questions.

THE COURT: Thank you. You may come down.

(Witness excused)

MR. SGARLATO: Your Honor, I had my witnesses scheduled for today. I had four witnesses remaining for today and --

THE COURT: Four?

MR. SGARLATO: Four. I have had two of them come in this morning and I had scheduled two for this afternoon. They were to appear here at 1:30. I called one of those witnesses and he is working and he is not home. I called up the other one and his wife told me that even though I told him to appear at 1:30 she said that he left to come here. So she can't reach him, and she said he should be here by now. I don't know if he stopped on the way, or I don't know where he is. I know he was scheduled to arrive at 1:30 as per my instructions because I thought the other two witnesses would take longer and I tried to schedule them to their convenience.

THE COURT: Let me ask you this, Mr. Sgarlato. How many witnesses do you have left?

MR. SGARLATO: Those are the only two, your Honor.

THE COURT: Who are they?'

MR. SGARLATO: That would be Como and Andrew Russo.

THE COURT: Did you subpoena these witnesses?

MR. SGARLATO: No, your Honor. One of them is a plaintiff and the other one is coming voluntarily.

THE COURT: Which one is coming at 1:30?

MR. SGARLATO: Both of them, your Honor. Both of them were scheduled to come at 1:30. Mr. Russo, his wife told me, is on his way now; he is coming from Brooklyn. She said he should have been here. But he was supposed to be here at 1:30. He may have stopped somewhere else.

THE COURT: We started at 9:40 this morning. You recall that I said we'd start at 9:30?

MR. SGARLATO: Yes, your Honor.

THE COURT: And you thought the two witnesses you had on this morning would take from 9:30 until 12:45?

MR. SGARLATO: Yes, your Honor.

THE COURT: How is that?

MR. SGARLATO: Well, I was going to go over various records with Mr. Fedele and your Honor advised that I shouldn't do that because those records were in evidence, and rather than emphasize these things, which is what I planned on doing, his testimony was cut short.

Mrs. DeMarco, I thought Mrs. DeMarco's testimony would take longer; I just miscalculated that.

Your Honor, I tried to schedule my witnesses

as conveniently as possible. I'm very sorry.

THE COURT: The witnesses should be here, Mr. Sgarlato. We never know when a witness is going to get through, so the thing to do is to have your witness in the witness room. We have to get through with these cases. We can't have a hiatus where we have a crash program, sitting around waiting for witnesses. That should be implicit.

Are you sure those witnesses are going to be here at 1:30?

MR. SGARLATO: Yes, your Honor.

THE COURT: Or are you just hoping that they will be here?

MR. SGARLATO: No, your Honor. I was with them last night. They will be hereat 1:30. One of them is a plaintiff. They will definitely be here, your Honor.

THE COURT: It is five minutes before 12 now. We are going to recess until 2 o'clock.

MR. BROOKS: Your Honor, a gentleman has just come in. Perhaps he is a witness. He is going out. Maybe we have a witness.

(Pause)

THE CLERK: No, your Honor.

MR. BROOKS: Excuse me.

THE COURT: We are going to recess until 2 o'clock

and if your witnesses are not here at 2 o'clock, Mr. Sgarlato, we are not going to wait any longer. That is two hours and five minutes from now. We recessed at 11:15 until a quarter to 12, didn't we, to give your witnesses time to get here.

MR. SGARLATO: Yes, your Honor.

THE COURT: And now we are going to recess for another two hours.

MR. SGARLATO: Yes. I'm very sorry, your Honor. It's my fault. I take the blame for it. I can only offer my apologies.

MR. BROOKS: May I inquire how much time Mr. Sgarlato expects to spend with these two witnesses, so that we will not fall into the same fate that he is in now and we will have witnesses available should we need to go on with our case this afternoon.

THE COURT: I suggest you have your witnesses here this afternoon at 2 o'clock also.

MR. BROOKS: Very well.

(Luncheon recess)

AFTERNOON SESSION

(2.25 p.m.)

THE COURT: Are you ready to proceed, Mr. Sgarlato?

MR. SGARLATO: Yes, your Honor.

I call Mr. Russo.

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A N D R E W R U S S O , called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SGARLATO:

Q Mr. Russo, are you appearing here today voluntarily?

A Yes, I am.

Q And have I agreed to reimburse you for the time that you are spending testifying here today?

A Yes, you have.

Q How much have I agreed to pay you for this time?

A Whatever time is taken of me, $100, $75, whatever amount of time you take.

MR. BROOKS: I don't think the answer is responsive to the question.

THE WITNESS: $75 to $100, whatever time I put

in here. If I put in a half a day, $75. If I spend a whole day here, my day is worth a hundred dollars. That's what I meant to say.

MR. BROOKS: I'm satisfied.

THE WITNESS: Thank you.

Q What business are you engaged in at the present time?

A Fruits and vegetables.

Q Do you also handle bananas?

A That's fruits and vegetables.

Q Prior to being involved in this fruit and vegetable business, were you involved solely in the banana business?

A Yes.

Q When was that, sir?

A How far back would you wish to go?

Q How long have you been involved in the banana business?

A 1945.

Q Up until what time did you handle bananas, solely, before you got involved in fruits and vegetables?

A 1965 I left the banana business completely in the way where I handled bananas and other products.

Q Mr. Russo, going back to approximately 1962,

what business were you engaged in at that time?

A Banana business.

Q What was the name of that business?

A Banana Dispatch.

Q Was that a corporation?

A Yes, it was.

Q Were you the only stockholder?

A No. I had Mr. Carmine Paduno.

Q During that time did you purchase bananas from Standard Fruit & Steamship Company?

A Yes, I did.

Q Did you deal with anyone in particular at Standard Fruit & Steamship Company?

A Yes. At that time we dealt mainly with Tony Congusto.

Q Was there anyone else?

A We dealt with Mr. Warren and we dealt with Delbeccaro.

Q Can you tell me what positions those men had at Standard Fruit & Steamship Company?

A Well, sales department, claim department and Delbeccaro more likely ran the whole show.

Q Were they selling bananas by the box in 1962?

A Yes, they were selling by the boxes and also by

the stems.

Q Can you tell us what amount of bananas you purchased weekly in 1962?

A We did anywhere from 20, $30,000 worth of bananas a week, approximately.

Q Are you familiar with the term "rollers"?

A Yes, sir.

Q Did you ever receive rollers from Standard Fruit & Steamship Company in 1962?

MR. BROOKS: Your Honor, I am going to object to 1962 testimony. I think we have gotten the fact across that Mr. Russo has some history in the business. Why don't we get to 1968 with which we are concerned here.

MR. SGARLATO: Your Honor, it is my contention there is a common plan or scheme involved here. I know I am barred by the statute of limitation as far as damages go, but it is my intention to show from 1962 up to the present time the way in which rollers were distributed by Standard Fruit & Steamship Company to show this common plan or scheme, and it has nothing to do with the amount of damages. Only the scheme involved.

THE COURT: All right.

MR. SGARLATO: Thank you, your Honor.

Q Mr. Russo, did you purchase rollers from

Standard in 1962?

A Yes, we did.

Q When would you place your order, at what time of the week?

A Well, we would place our order prior to the shipping being at port, one day prior.

Q Prior to the ship's arrival?

A Prior to the ship's arrival.

Q Did you place an order for rollers at that time?

A No.

Q How would you obtain the rollers?

A We would obtain the rollers after the day's purchase, the following day we would be granted rollers which were carloads of bananas, whether it was one, two, four, five.

Q Carloads?

A Carloads.

Q Let's assume you needed 3000 boxes of bananas for a week in 1962, would you order the 3000 boxes prior to the ship's arrival?

A No.

Q How would that work, Mr. Russo?

A If we needed 3000 boxes of bananas, we would order 500, a thousand, depending how many the ship is

bringing in.

Now, upon ordering 1000, we were told in advance --

Q By whom, Mr. Russo?

A By Standard Fruit.

Q One of their representatives you have mentioned?

A Yes, whether their sales were heavy or light. So, it would give us an edge on purchasing the merchandise.

Q Were these rollers guaranteed to you by these representatives?

A Nine out of ten they were delivered.

MR. BROOKS: I object, your Honor. That is not responsive to the question, whether they are guaranteed.

THE COURT: Yes.

Were they guaranteed? Yes or no?

THE WITNESS: No, nothing was ever guaranteed. Just by word of mouth.

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Q Can you tell me what percentage of the time you did receive these rollers when you were told that you were going to get them in advance?

A Well, it was a rarity when we didn't receive them.

Q What percentage of the time wouldn't you receive them?

A I would say about 10 per cent. 90 per cent we received them.

Q During that time in 1962 in return for being able to order these rollers in advance, did you give anything to these representatives of Standard Fruit & Steamship Company?

A Yes, we did.

Q What did you give to them?

A Money.

Q How did you pay the men money? In what form, check?

A Cash.

Q Was that payment part of the invoice charged by Standard Fruit & Steamship Company?

A It had nothing to do with it.

Q In addition to these discounts that you were receiving from representatives of Standard Fruit did you receive any claims?

A Yes, we received--

MR. BROOKS: I object to the question. The witness hasn't testified that he received any discounts. He testified that he was given information that rollers may be available.

THE COURT: Yes. Is that what you are calling discounts, Mr. Sgarlato?

MR. SGARLATO: Yes, your Honor. I will rephrase the question.

Q Mr. Russo, you received this information with regard to rollers before the ship arrived; is that correct?

A That's right.

THE COURT: I thought his testimony was he placed an order the day before the ship arrived; and then the day after he was given information about rollers or could purchase rollers.

THE WITNESS: No, your Honor. We were told in advance.

THE COURT: About the rollers?

THE WITNESS: About rollers. When we placed our order the day before, we were told, don't buy too many, just buy a hundred, just buy a thousand; we have plenty of bananas and we have no orders, so don't give us any big order because you make your own market, you build up your own market.

So they make us buy a minimum amount, which was for our benefit: So we would give them a minimum order and then the following day they will say how many more do you want and we would get first crack.

THE COURT: But you had to pay them for these?

THE WITNESS: For these privileges you pay.

THE COURT: What do you mean, pay?

THE WITNESS: Pay, give them money, give them cash. A hundred, 200, 300, 400, depending how many cars they are giving you. Assuming a freight car of bananas was 2,000 and they gave you the same freight car the following day for a thousand dollars less, well, you would at least reimburse a couple of hundred dollars a car.

THE COURT You would reimburse--

THE WITNESS: What I mean by reimburse, you would get this $200 cash and give it to the party that gave you this information.

THE COURT: So that you paid an additional $200 on top of it, right?

THE WITNESS: Right. Which had nothing to do with the company.

Q These payments were made to representatives of the company, is that correct, Mr. Russo?

A Yes.

Q Mr. Russo, did you ever receive claims from Standard Fruit in 1962?

A Yes, we did.

MR. BROOKS: Your Honor, I am going to object to all this 1962 testimony. However interesting it may sound, I think it is completely irrelevant to '68 to '72.

THE WITNESS: You could go to '65.

MR. SGARLATO: Your Honor, this would be brought up gradually and I will bring it up to date. I think there is a scheme involved here that should be brought out to this court. There is no jury involved--

THE COURT: Let me see if I understand what your claim is.

From the witness' testimony, he's now testified as I understand it that representatives of the company who knew that there would be a surplus involved themselves in a scheme whereby in order to make extra money unknown to the company they would give out information to regular dealers that the next day they could get a carload for half the price; is that what he is testifying to?

MR. SGARLATO: Yes, your Honor. But--

THE COURT: Is that what he is testifying to?

MR. SGARLATO: Yes, your Honor.

THE COURT: Is that what this case is about?

MR. SGARLATO: Yes, your Honor. Because the records of the company reveal that, and the company would have knowledge of that from their own records.

THE COURT: Reveal what?

MR. SGARLATO: Reveal that certain customers were getting preferential treatment. It's so obvious if you look at the records, your Honor. There must be a reason for it. Because the defendant in his own interrogatories cannot explain it.

THE COURT: Your claim I thought was that the company, Standard Fruit, arbitrarily gave preference to

b2 certain dealers.

MR. SGARLATO: Yes, your Honor.

THE COURT: In a price discrimination scheme.

MR. SGARLATO: Yes.

THE COURT: Now the testimony of this witness is that the company didn't know anything about this; that this was something its employees did and pocketed what are in effect bribes or gratuities paid to the employees to do this.

MR. SGARLATO: I understand, your Honor, but the records of the company reflect that certain customers were getting this preferential treatment, so although it was done by representatives of the company, that knowledge would be imputed to the company because it was so obivous

on the face of their own records, and these charts I show are beautiful examples of that, your Honor, where certain customers constantly received these rollers and were given preferential treatment.

I have had other witnesses on the stand that testified they had no knowledge and very rarely received these rollers.

MR. BROOKS: Your Honor, until this witness can tell us what the situation was in 1962 I don't think that his testimony about his delinquencies in 1962 has any relevance to this case.

THE COURT: Yes, that is a separate point.

MR. BROOKS: There is no common plan or scheme alleged in this complaint, there is nothing about bribes to employees of the company alleged in the complaint.

Q Mr. Russo, you are the brother of Frank Russo?

A Yes, I am.

Q What business is your brother Frank Russo in?

A The banana business.

Q He deals in wholesale bananas?

A Yes.

Q Has he been in that business since at least 1968 up to the present?

A Yes.

Q During the period 1968 to 1972 did he purchase bananas from Standard Fruit & Steamship Company?

A Yes.

MR. BROOKS: Objection. We have no foundation for the source of this witness' knowledge. It sounds like hearsay to me.

THE COURT: Yes.

MR. SGARLATO: I will lay the foundation, your Honor.

Q Mr. Russo, during the period 1968 to 1972 did you purchase bananas from anyone?

A Yes.

Q Would you tell us where you purchased your bananas?

A Frank Russo.

Q Where is his place of business?

A 33 Carroll Street.

Q How often would you go to your brother's place of business?

A Almost daily; three or four times a week, five times a week.

Q Had you ever been in business with your brother Frank?

A Yes.

Q Are you familiar with your brother's business records?

A Yes.

Q Did you have access to your brother's business records?

A Yes.

Q Where are these records kept?

A In the office.

Q Did you ever look at them?

A Yes.

Q How often would you look at them during the period '68 to '72?

A Many times. When price changes whereby it didn't satisfy my needs, I would inspect the bills and find out what they actually cost.

Q Did your brother ever object to your looking at these bills?

A Never.

Q Did you do it in his presence?

A Yes.

Q Did you also inspect bills with regard to claims that he made with Standard Fruit & Steamship Company?

A Yes.

Q Are you familiar with the amounts that were charged to him by Standard Fruit & Steamship Company?

A Yes, because I had to be charged for the fruit

myself, since I am taking some fruit.

Q Mr. Russo, to your knowledge did your brother deal with any one person from Standard Fruit & Steamship Company from '68 through '72?

A Well, he started with I think Tony Conqusto. And then I think he followed up with Mr. Sbrocco.

Q That is Roger Sbrocco?

A Roger Sbrocco.

Q Do you know Mr. Sbrocco?

A Yes.

Q During this time did your brother order rollers in the same manner you had ordered them in 1962?

A Same identical.

Q In other words, he would get information in advance and in return for this information --

THE COURT: Excuse me. Is this the same Frank Russo that is up in the Bronx, in the Bronx market?

MR. SGARLATO: That is D. Loi, your Honor. This is the same Frank Russo in Brooklyn, that all the witnesses have been mentioning. This is his brother.

Q Have you ever seen Mr. Sbrocco in your brother's place of business?

A Yes, I have.

Q During the period '68 through '72?

A Yes, I have.

Q How often would you say Mr. Sbrocco came to see your brother?

A Maybe once a week, maybe once every two weeks.

Q Were there occasions when you were there when Mr. Sbrocco came to see your brother?

A Yes, I was.

Q Can you tell us what occurred when Mr. Sbrocco visited with your brother?

A Well, the same situation occurred as when I was in business, whereby get knowledge of what the happenings are and be prepared for what to purchase, and guide yourself accordingly.

Q Did your brother Frank give Mr. Sbrocco anything in return for this information he was receiving from Mr Sbrocco?

A Yes, he did.

Q What did he give him?

A Money.

Q Did you see him give him this money?

A Yes, I did.

Q It was done openly in front of you?

A Yes, I did.

Q Were you ever present when your brother ordered

bananas from Standard?

A Yes, many times.

Q Were you ever present when he ordered them in person from Mr. Sbrocco?

A Well, in person, he would be on the outside of the office, I'd be on the inside office.

Q Can you tell us the manner in which your brother would order bananas?

A In the same manner. A pattern started back in '55. He has learned the pattern from me and continued it. It's a situation where you ask for favors and you pay back in cash.

Q Your brother is engaged in this right now?

A Right. But what these people do with the cash, maybe they don't keep these cash, I don't know. But I do know that they collect cash. Somebody gets it.

Q Did your brother to your knowledge, did your brother make claims against Standard Fruit & Steamship Company?

A Yes, he did.

Q Can you explain that to us, whether or not there was any advantage to those claims?

A Yes. Well, assuming Standard Fruit might get a couple of orders whereby -- a couple of telephone calls where people complain about the merchandise. That doesn't mean the whole ship, the whole cargo is no good. Maybe just

those two customers received a portion of the cargo that was defective.

So since those phone calls has been turned in, it was an opening for Frank Russo to call in and say I have some bad ones too.

MR. BROOKS: Move to strike the testimony, your Honor. It is clear that the witness doesn't know what telephone calls Standard Fruit received in its office. I think he is speculating.

He started out "Assume that." There is no foundation for this kind of testimony.

THE COURT: Yes, I think so. Objection sustained.

Q How do you know this to be true, Mr. Russo?

A Well --

MR. BROOKS: I object to the form of the question.

Q Were you ever present when your brother made claims?

A Yes. He made claims and in turn he would give me credits for the claims he gets, because if I am receiving a portion of his bananas and I am consuming these bananas and he gets a claim, so do I get the claim. But I get it through my brother.

THE COURT: What does that mean, get a claim?

THE WITNESS: In other words, get credit, your Honor. You know, if I paid, for argument's sake, $5 a box, and he got credit for a dollar a box or 40 cents a box, or 20 cents a box, whatever the figure is, he would give me part of that claim because I'm entitled to it since I used a portion of the bananas.

Q Mr. Russo, when your brother received these claims, in effect the company was giving him money back b-cause some of the bananas were defective?

A Yes.

Q Were they defective?

A No, the bananas were beautiful in many cases. I don't say every case. In many cases.

Q Would your brother do this through Mr. Sbrocco also?

A Yes.

Q Were you ever present when they discussed this?

A Yes.

Q Would your brother give Mr. Sbrocco money in return for this favor also?

A Yes.

Q Would he give it to him in cash?

A Yes.

Q Mr. Russo, I am going to read to you from Defendant's Proposed Exhibit A-1, shipment of March 28, 1968. On that date, Mr. Russo, your brother purchased Ecuado boxes. He purchased 900 boxes for $1.60, 1500 boxes for $2.50, 250 boxes for $2, 250 boxes for $2, 920 boxes for $1.60, and 280 boxes for $1.60.

On the same date, from the same ship, also for Ecuador boxes, one of the plaintiffs in this case, Thomas DeMarco, purchased 225 boxes for $2.80.

Can you tell me of your own knowledge how your brother was able to obtain these bananas so much cheaper than one of his competitors?

MR. BROOKS: I object to the question unless Mr. Sgarlato first establishes that Mr. Russo has personal knowledge of the situation on or before the transaction of March 28, 1968, and can tell us that he has that knowledge instead of just speculating.

MR. SGARLATO: Your Honor, this man has testified that he has dealt with this company, that he is totally familiar with his brother's business, he has access to the records, he has seen the records, he has been present during conversations between representatives of this company.

THE COURT: Objection sustained.

Q Mr. Russo, can you tell me approximately, on

the average, how much less your brother was able to obtain bananas for, how much less than other competitors in the Brooklyn area?

MR. BROOKS: I object to the question. There is no foundation for the witness ever making such a calculation or --

THE COURT: Yes, sustained.

Q Are you familiar with the invoices that your brother received?

A Yes.

Q Did you look at those invoices almost every week, Mr. Russo?

A Yes.

Q Were you familiar with the market of bananas during those weeks?

A Yes.

Q Have you been in the banana business for a period in excess of 20 years?

A 40 would be more like it.

Q Mr. Russo, based on your knowledge of your brother's invoices and the amounts of money paid by him to Standard Fruit & Steamship Company, can you give me an approximation of the price advantage your brother would have over other competitors in the Brooklyn area?

MR. BROOKS: Same objection. Still no foundation.

THE COURT: Sustained.

MR. SGARLATO: I take exception, your Honor.

I have no further questions.

CROSS EXAMINATION

XX BY MR. BROOKS:

Q Mr. Russo, when did you stop dealing with Standard Fruit directly?

A 1965.

Q At the time you stopped dealing, you were buying 20 to $30,000 worth of bananas a week?

A Yes. We had the largest warehouse in Brooklyn.

Q When you stopped dealing with Standard Fruit, did you owe them any money?

A Sir?

Q Did you owe them any money when you stopped dealing?

A Sure.

Q How much?

A I don't know. Maybe about -- I'm going roughly speaking -- a hundred thousand.

Q Did you ever pay them? Did you pay that hundred thousand?

A They paid themselves very well.

Q Did you ever pay them the hundred thousand?

A They paid themselves well.

Q I asked you if you ever paid.

A It was paid.

Q By you?

A By the corporation.

Q What corporation?

A Banana Dispatch Corporation.

Q Did you leave Standard Fruit hung up for about $100,000 worth of bills when you went out of business?

A No. It was paid through Banana Dispatch.

Q How did that work?

A Very simple. They used Banana Disparch as a toy, to sell their produce, their bananas to get a better price in the industry, in the entire industry. So, they used Banana Dispatch as a strenthening point so they could get more money elsewhere.

Q You figure that's the way they got paid back the hundred thousand?

A Not only they got paid but they also got interest with it because this Banana Dispatch wasn't really myself or Mr. Carmine Paduno. This was Standard Fruit themselves.

Q What do you mean by that?

A Where does a company come giving Paduno and myself unlimited credit up to $250,000 worth of merchandise, whereby we didn't even have any equities to cover that amount?

Q Are you saying that the corporation, Banana Dispatch, paid by check or by cash to Standard Fruit bills that were owing?

A We paid by check.

Q You paid by check?

A We paid by check.

Q When did that happen?

A Throughout the years that Standard Fruit has been in business -- I mean, Banana Dispatch has been in business.

Q Do you think they have those canceled checks around?

A Yes, I have some, quite a few. I have the stubs.

Q Did this happen after you left?

A Sir?

Q Did this repayment occur after you left?

A I don't quite understand.

Q You said you left Banana Dispatch in 1965.

I'm asking you if the amount was paid back after you left.

A The amount was paid when the company ceased to operate. And how it was paid, I tried to explain it to you but I'll try it in a better manner.

Somebody gave too much merchandise to this outfit. Whether it was Tony Congusto, whether it was Mr. Warren, whether it was Delbeccaro. They made a mistake. In fact, they made a protest about that. All the banana people made a complaint to the fact that they couldn't obtain no bananas and in order to buy bananas in the industry, they had to come to McDonald Avenue. Now, is that proving the fact that Banana Dispatch is Standard Fruit? Do you understand what I'm trying to explain?

Q No, but I'm --

A All right. Let me put it this way.

X amount of moneys was due to Standard Fruit and somebody pulled a boner because they didn't handle the situation properly. So, what they did do is, they started giving all kinds of crazy claims to Banana Dispatch, which was not correct -- what I mean by correct is not that the merchandise was bad; they gave us claims to wipe out the debt, and not to put this on record in the industry and have it blown up.

Q Was there a dispute about this amount owed?

A Is there a dispute?

Q Was there a dispute?

A No, no dispute. The amount was correct.

Q Was there a dispute about getting payment for the amount?

A Yes. Do you want to know how?

Q I will ask the questions I want answers to.

A All right.

Q Mr. Russo, when you observed your brother and Mr. Sbrocco talking, were you in the room?

A What room?

Q The same room they were talking in?

A They have spoken in front of me; they have spoken outside the office.

Q There were times were when you were present, in other words?

A Right.

Q And in the same room?

A Right.

Q Did you have any knowledge of whether the subject of the conversation that they were having was not a common subject that was discussed with other banana men as a matter of course, the state of the market, whether we're rolling this week or not?

A I handed him the pattern.

Q I just want an answer to my question.

A Yes, I handed him the pattern. I mean, I teached them how the business rolls. I know what's going on before they even talk.

Q My question to you is:

Do you know that the subject of the conversation that you overheard from time to time was not a conversation wh ich was being discussed by Mr. Sbrocco or other representatives of S andard Fruit with almost anybody who cared to listen about the state of the market?

A Repeat that. I want to answer it correctly

MR. BROOKS: Would you read it back.

(Question read.)

A I have been present whereby --

Q Would you answer yes or no?

A I think I understand that question. Give it to me in a different form. I think I understand it, but I want to answer it correctly.

Q Are you saying you cannot answer it in the form the reporter read it back?

MR. SGARLATO: Objection, your Honor. He said he didn't understand the question.

A Can you give it to me in a simpler --

MR. SGARLATO: The witness has stated --

THE COURT: All right, phrase the question in a simpler form.

Q Mr. Russo, can you tell me of your own knowledge that you know Mr. Sbrocco did not discuss the subject of those conversations, that is, we're rolling this week or we're oversupplied with other banana men with whom he may have talked or the representatives of Standard Fruit did not freely discuss that state of the market with other banana men, besides your brother Frank?

A I know what he discussed with my brother Frank. I don't know what he discussed with other banana men.

Q So you can't tell us that.

A No, I can't tell you what he discussed with other banana men.

Q And you weren't dealing with Mr. Sbrocco at this time on your own?

A No, I wasn't dealing with Mr. Sbrocco.

Q Isn't it true when banana men get together, the first thing they talk about is the state of the market?

A Yes, and each and every banana man is a liar.

Q I'll take your word for that, sir.

A Including myself. They pay $4 and they say they paid $3.80 to hear whether the other guy says I paid

the same thing and then they run to the telephone and say "You charged him $3.80; why did you charge me $4?" This is the business.

Q Isn't it true that a savvy banana man like yourself and your brother knows exactly what's going on in the market each week, whether United is rolling this week or whether Standard is rolling this week?

A The only thing we know is what Mr. Standard Fruit or what United wants us to know.

Q How do you learn that? How do you learn what United wants you to know?

A How do you what?

Q How could you learn it?

A Learn it?

Q Yes.

A You learn it through your contacts.

Q What contacts?

A Whom you're buying from.

Q You pick up the telephone and --

A You don't pick up the telephone on stuff like that. When you pick up the telephone, you give an order and that's it. Later on you talk about that, after you purchased.

Q Mr. Russo, isn't it a fact that any smart

banana man who is playing the market knows exactly what the state of the market is eacy week before he buys, whether it's oversold or undersold?

A What you're telling me is, is it a fact that the stockbrokers know exactly where they put their money.

Q Can you answer the question yes or no?

A You're telling me the --

Q Can you answer the --

A Of course not.

Q Your brother doesn't know that?

A Nobody knows that. Only the one that's got the commodity and the one that could govern it knows.

Q Suppose you called up Standard Fruit and you asked what's the price of bananas and you get a price, right?

A You get a price.

Q You call up United and ask what are you selling bananas for today and --

A They give you the same price.

Q And West Indies?

A The same price.

Q They all get the same price?

A Maybe 10 cents, 20 cents differential. They all give you the same price.

Q From these telephone calls can't you learn the state of the market?

A What could you learn from 20 cents? We're looking for dollars.

Q Is it your testimony you cannot determine the state of the market from these telephone calls?

A Of course not.

Q Do you know how often your brother Frank would call United Fruit in a week, an average week?

A Every day.

Q Every day?

A Almost every day.

Q How often would he call Standard?

A Every day.

Q How often then would he call Pan American?

A Every day, in order to know the market.

Q And he would know the market?

A In order to know the market, but you never get nothing on the telephone. My best deals were in a barroom.

Q I know about your deals.

A Or anybody else's deals. Not by the telephone.

Q But your brother kept calling, I guess?

A Pardon me?

Q Your brother kept calling?

A You got to keep calling. You got to try to find something out. Although you don't find nothing, you try to find something.

Q I take it you never believed success was obtained through these telephone calls?

A Through telephones?

Q Yes.

A Never.

Q These payments of money that you talked about yourself, in 1962, you made payments to employees of Standard Fruit, I take it?

A Yes.

Q Would it be fair to characterize those as bribes?

A Pardon me?

Q Would it be fair to characterize those payments as bribes?

A You want to call them bribes, shmear, grease or any name you want. But, it's favors you obtain by giving the moneys to them and maybe for all I know they don't even get that money, they give it to somebody else. Maybe they're just in-between men and this is what hurts. I would like to see the big man get hurt.

Q How much money would you pay them?

A Pardon me?

Q How much money would you pay them?

A As much as a big favor you give me. If you gave me five rollers and you gave them to me at $5000 less -- a thousand dollars less each car, that's $5000. I can't give you less than $500.

Q Did you ever pay them these side payments in the form of a check payable to Standard Fruit?

A Never, never.

Q In fact, you testified a while ago that th is had nothing to do with the company, didn't you?

A True.

Q This was on the side?

A It has nothing to do with the company, but they are attached to the company. I mean, who are you going to call the company? If you get President Ford, he's the President. Rockefeller is the Vice-President.

Q I understand your point.

Did you ever pay any money to Mr. Sbrocco?

A Did I?

Q Yes, sir.

A Yes, I did.

Q When?

A Going back '69. Just one time with him, but mostly --

Q I thought you were buying from your brother Frank in '69.

A Not '69. I know it was one time with Mr. Sbrocco. Mainly my operation was with Tony Congusto.

T4 Q Whe. did you stop dealing directly with Standard, did you say?

A '65.

Q So it would have to be before that?

A I don't recollect when, but only one time.

Q How much?

A I don't remember. 200, 300, I don't know.

Q What did you get for that?

A Pardon me?

Q What did you get for that?

A Information.

Q What kind of infomation?

A Information, whatever I was looking for. How many should I order, how many I need. But like I told you, with Mr. Sbrocco was one time.

Q Do you know that Mr. Sbrocco or whomever you dealt with didn't give thissame information to anybody who asked without any payment of money?

A Pardon me?

Q Do you know whether this information was available to any customer that asked, without any payment of money?

A I know that as a fact.

Q You know that as a fact?

A That you give favors for nothing? I know I don't.

Q Do you know as a fact that this information was not freely given out to any customer that would call and ask, without any bribe?

A I didn't understand you, sir.

Q You don't understand that question?

A No, I didn't quite understand it.

Q Let's try it again.

Can you tell me that you know that information was not available to any customer of Standard without the payment of a bribe?

A I know that without a bribe, as you call it, you don't get no favors.

Q I'm not asking you whether you get any favors. I am asking you whether the kind of information that you are talking about, how much should I order, whether the market is good or poor, was not freely available for any customer that inquired.

A No, only favors, I would imagine.

Q But you don't know, do you?

A No, I says I would imagine. I use the word imagine.

Q I want you to say you don't know.

A All right, so I don't know. But I do know in this case, since I am involved that I could tell you only what I do know.

Q And you used a little grease?

A Right.

Q When you were in your brother Frank's place of business did you inspect all of the records, make an audit of all his business records?

A I don't make no audit. I'm not a CPA.

Q I want to know what you looked at that you could testify to about his business.

A I buy bananas every day, and maybe once a week I feel that the price is not correct. I check it out.

Q What do you look at when you checked it out?

A Pardon me?

Q What do you look at?

A The Standard Fruit & Steamship Company's bill, or if it's United Fruit, I looked United Fruit bill. If it's Pan American, I look at Pan American's bill. If it is Polasses Trading Corporation, I take a look at it. Whomever that we had merchandise of that week that we consumed.

Q So you didn't look at all of your brother's business records, you just looked at the invoice of the company's fruit that you purchased?

A We only look at the invoices of the merchandise that we are selling. If we didn't obtain the first part of the week no bananas from Standard Fruit, what bills am

I going to find of Standard Fruit? None.

b2 Q Did you ever hear of averaging down, Mr. Russo?

A Sir?

Q Did you ever hear of averaging down?

A Averaging down?

Q Yes. Do you know what that means?

A Yes, I know what it means, but --

Q Did your brother average down on bananas?

A I'd like for you to explain me what average down means. I think I know what it means.

Q Why don't you tell me what you think you know.

A You buy a box of bananas for $5 and then you buy bananas for $3, and you feel that they cost $4.

Q And you sell the combined total at 4, right?

A Yes.

Q That is what I understood.

A Well, I thought that is what you meant.

Q Now I am asking you if you know that your brother does that from time to time?

A Sure. Some time it's worse than that. Sometimes you buy them for 5 and you sell them for $2. Sometimes you buy them for $2 you sell them for $5.

Q Did you brother sometimes sell bananas at cost just to attract customers to buy his other produce?

elh5 Russo-cross

A No, to get out because maybe the demand is not great so you have to lower the price.

Q Your brother had to do that?

A Sure.

Q Maybe sell at cost?

A Sure.

Q Maybe below cost?

A Sure. That is why I told you $2 when they cost 5.

Q Your brother sold a lot of other produce, didn't he?

A No. For a long spell he's been only in the banana field.

Q Let's keep it '68 to '72.

A '68 to '72, yes, he handled some produce.

Q When you observed your brother making payments, were those in your presence, those payments that you observed your brother making?

A Were they in my presence?

Q Yes.

A No, but the checkbook was.

Q Your brother made these payments by check?

A To Standard Fruit for the merchandise he received.

Q No, I am talking about the grease.

A Always in cash, I told you that.